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SUPREME COURT OF THE UNITED STATES.

No. 247.

GEORGE W. KIDD, APPELLANT,

vs.

W. W. JOHNSON & CO.

aff'd.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 8, 1877.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth circuit and district of Louisiana.

W. W. JOHNSON & CO.
vs.
SCHERCK & BERKSEN ET ALS. } No. 8008.

Bill of complaint.—Filed November 20th, 1876.

Circuit court for fifth circuit, district of Louisiana, to the judges thereof, in equity sitting.

The bill of complaint of William W. Johnson, Thomas E. McNamara, Nicholas E. Reider, citizens of the State of Ohio, and composing the commercial firm of W. W. Johnson & Co., transacting business at Cincinnati, in said State, against Scherck & Berksen, Smith Brothers & Co., John T. Moore & Co., Joseph Dreyfus, J. Jeannaud, and J. Mandin, commercial firms, said firms and individuals, defendants, citizens of the State of Louisiana; humbly complaining, your orators shew:

2 That they are citizens of the State of Ohio, engaged in the business of distilling spirituous liquors, and vending the same; that they have been so engaged for many years, at said Cincinnati, and throughout the west and southwest; that they are successors of the commercial firm of Mills, Johnson & Co., of said city, who were successors of S. N. Pike & Co., of said city also; that the business was established by S. N. Pike many years ago, who prosecuted the same in his own name, and afterwards associated with others, who sold and transferred all their interest, good will, and rights attending and growing out of said business, and among other things trade-marks, to said Mills, Johnson & Co., and said transferrees transferred and sold the same to these complainants; that said S. N. Pike acquired great reputation throughout the country for the manufacture of an article of whiskey, and in order to maintain said reputation, and secure the trade and make known to all men the verity of the article as sold by him, and so prevent purchasers of whiskey from being deceived and de-

3 frauded, adopted as a trade-mark and token to be affixed to all packages of whiskey of his manufacture of like character and quality, a circle surrounding the words—

upon an orange ground; that said trade-mark or token or distinction was adopted many ago, and became well known, and the quality of the whiskey made & sold under same was regarded with such favor that the trade became very extensive and lucrative; that said trade-mark or token indicated to purchasers that they were purchasing a superior article, and in giving general orders for purchases to dealers, both retail dealers and consumers could state by said trade-mark their desire for a favorite brand; that said S. N. Pike sold and transferred

on or about , the business of manufacturing whiskey, and selling the same with the good will thereof, and the trade-marks to
4 said Mills, Johnson & Co.; that said Mills, Johnson & Co. transferred the same on or about October 1st, 1875, to complainants, who have conducted said business ever since; that they have manufactured whiskey of the same quality, and labeled the packages thereof with the mark aforesaid; that purchasers of whiskey with said label had a right to expect that they had bought an article which had become distinctive thereby; that on or about the said label or trade-mark was registered, according to the provisions of an act of Congress in that regard, and secured the right to same to these complainants.

And these complainants aver that, notwithstanding the rights aforesaid and in fraud thereof, certain parties in the city of St. Louis, to wit, Tyra, Hill & Co., combining and confederating with other parties, to your orators unknown, have counterfeited said label, and are offering, contrary to good conscience and the rights of your orators, whiskey with said labels fixed upon the packages, thereby pretend-
5 ing that said packages contained the whiskey manufactured by those entitled to use said token, to wit, your petitioners, thereby deceiving purchasers, and interfering with the trade of your orators; that the defendants aforesaid, well knowing that your orators have the rights aforesaid, and being advised thereof, nevertheless have contracted for, are receiving, and have received and offered for sale packages with the counterfeit token aforesaid; that they are thereby deceiving, and have deceived the trade and consumers, and have endamaged your orators in the sum of one thousand dollars, and said damage is continued and growing, and the business and trade of your orators, which have been specially large in the city of New Orleans, greatly impaired, and to an extent it is impossible to estimate.

All which actings and doings of said defendants are contrary to equity and good conscience, and tend to the manifest injury, wrong, and oppression of your orators in the premises.

In tender consideration whereof, and forasmuch as your orators
6 are remediless in the premises at and by the strict rules of the common law, and are relievable only in a court of equity, where matters of this nature are properly cognizable and relievable, to that end, therefore, that your orators may have equitable relief, that the said defendants may severally answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the plaintiffs, and that said defendants be severally restrained by injunction issuing out of this honorable court from contracting for, buying, selling, or otherwise trafficking in any whiskey upon which the trade-mark aforesaid is proposed to be fixed, or shall be stamped or otherwise affixed, by said Tyra, Hill & Co., or their agents, or from placing upon any whiskey or packages thereof said mark or token; that such injunction issue pendente lite; that the damages of your orators may by due proceedings be assessed, and a decree entered against the defendants severally therefor. And your orators ask for all such other and further relief as the nature of this case may require and to your honors may seem meet.

7 May it please your honors to grant unto your orators the writ of subpœna, to be directed to Scherck & Berksen, Smith Bros. & Co., John T. Moore & Co., Joseph Dreyfus, J. Jeannaud, and J. Mandin, citizens of Louisiana, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there to

make true, full, direct, and perfect answer to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

(Signed) CLARKE, BAYNE & RENSHAW,
Solicitors for Complainants.

(Signed) THOS. ALLEN CLARKE,
Of Counsel.

A. GROVERMAN, jr., being duly sworn, deposeth and saith that he is the agent of said complainants in the premises, that he has heard the foregoing bill read and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are
8 therein stated to be on information and belief, and as to these matters he believes them to be true.

(Signed) A. GROVERMAN, JR.

Sworn to & subscribed before me this 20th Nov., 1876.

(Signed) F. B. VINOT,
D'y Clerk.

Subpœna in chancery to Scherck & Berksen.—Issued November 20th, 1876.

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the district of Louisiana, greeting:

You are hereby commanded to summon Scherck & Berksen, citizens of Louisiana, to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of January, 1877, then and there to answer a bill in chancery filed against them and others, wherein W. W. Johnson & Co., citizens of the State of Ohio, are complainants, and said Scherck & Berksen and others are defendants.

Herein fail not, and have you then and there this writ, with
9 your endorsement thereon how you have executed the same.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 20th day of Nov'r, in the year of our Lord one thousand eight hundred and seventy-six, and the 101st year of American Independence.

[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

The defendants are hereby notified that they are required to enter their appearance in the clerk's office of the United States circuit court on or before the first Monday of January, 1877, otherwise the bill may be taken pro confesso.

(Signed) F. B. VINOT,
D'y Clerk.

Marshal's return thereon.

Received November 21st, 1876, by the U. S. marshal, and on same day, month, & year served a copy of within subpœna in chancery on Scherck & Berksen, named herein, by handing the same to Louis
10 Scherck, a member of said firm.

New Orleans, November 24th, 1876.

(Signed) S. W. REED,
D'y U. S. Marshal.

Subpœna in chancery to Smith Bros. & Co.—Issued November 20th, 1876.

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the district of Louisiana, greeting:

You are hereby commanded to summon Smith Brothers & Co., citizens of the State of Louisiana, to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of January, 1877, then and there to answer a bill in chancery filed against them and others, wherein W. W. Johnson & Co., citizens of the State of Ohio, are complainants, and said Smith Brothers & Co. and others are defendants.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

11 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 20th day of November, in the year of our Lord one thousand eight hundred and seventy-six, and the 101st year of American Independence.

[SEAL.] (Signed) F. B. VINOT,
Dy Clerk.

The defendants are hereby notified that they are required to enter their appearance in the clerk's office of the United States circuit court on or before the first Monday of January, 1877, otherwise the bill may be taken pro confesso.

(Signed) F. B. VINOT,
Dy Clerk.

Marshal's return thereon.

Received November 21st, 1876, by the U. S. marshal, and on same day, month, and year served a copy of the within subpœna in chancery on Smith Brothers & Co., named herein, by handing the same to J. B. Sinnott, a member of said firm.

New Orleans, November 24, 1876.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By S. W. REED,
Dy U. S. Marshal.

12 *Subpœna in chancery to John T. Moore & Co.—Issued November 20th, 1876.*

UNITED STATES OF AMERICA:

The President of the United States to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon John T. Moore & Co., citizens of the State of Louisiana, to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of January, 187., then and there to answer a bill in chancery, filed against them and others, wherein W. W. Johnson & Co., citizens of the State of Ohio, are complainants, and said John T. Moore & Co. and others are defendants.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 20th day of
13 November, in the year of our Lord one thousand eight hundred and seventy-six, and the 101st year of American Independence.

[SEAL.] (Signed) F. B. VINOT,
Dy Clerk.

The defendants are hereby notified that they are required to enter their appearance in the clerk's office of the United States circuit court on or before the first Monday of January, 1877, otherwise the bill may be taken pro confesso.

(Signed) F. B. VINOT,
Dy Clerk.

Marshal's return thereon.

Received November 21st, 1876, by the U. S. marshal, and on same day, month, and year served a copy of within subpœna in chancery on John T. Moore & Co., named herein, by handing the same to John T. Moore, jr., a member of said firm.

New Orleans, Nov. 24th, 1876.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By S. W. REED,
Dy U. S. Marshal.

14 *Subpœna in chancery to Joseph Dreyfus.—Issued November 20th, 1876.*

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the district of Louisiana, greeting:

You are hereby commanded to summon Joseph Dreyfus, a citizen of the State of Louisiana, to appear before the honorable the judges of the fifth judicial circuit of the United States of America at a circuit court to be holden on the first Monday of January, 1877, then and there to answer a bill in chancery filed against him and others, wherein W. W. Johnson & Co., citizens of the State of Ohio, are complainants, and said Joseph Dreyfus and others are defendants.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 20th day of No-
15 vember, in the year of our Lord one thousand eight hundred and seventy-six, and the 101st year of American Independence.

[SEAL.] (Signed) F. B. VINOT,
Dy Clerk.

The defendant is hereby notified that he is required to enter his appearance in the clerk's office of the United States circuit court on or before the first Monday of January, 1877, otherwise the bill may be taken pro confesso.

(Signed) F. B. VINOT,
Dy Clerk.

Marshal's return thereon.

Received November 21st, 1876, by the U. S. marshal, and on the 23d day of same month and year served a copy of within subpœna in chancery on Joseph Dreyfus, named herein, by handing the same to him in person.

New Orleans, Nov. 24, 1876.

(Signed) J. R. G. PITKIN,
U. S. Marshal,
By S. W. REED,
D'y U. S. Marshal.

Subpœna in chancery to J. Jeannaud.—Issued November 20th, 1876.

UNITED STATES OF AMERICA:

16 The President of the United States to the marshal for the district of Louisiana, greeting:

You are hereby commanded to summon J. Jeannaud, a citizen of the State of Louisiana, to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of January, 1877, then and there to answer a bill in chancery filed against him and others wherein W. W. Johnson & Co., citizens of the State of Ohio, are complainants and said J. Jeannaud and others are defendants.

Herein fail not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 20th day of Nov., in the year of our Lord one thousand eight hundred and seventy-six & the 101st year of American Independence.

[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

17 The defendant is hereby notified that he is required to enter his appearance in the clerk's office of the United States circuit court on or before the first Monday of January, 1877, otherwise the bill may be taken pro confesso.

(Signed) F. B. VINOT,
D'y Clerk.

Marshal's return thereon.

Received November 21st, 1876, by the U. S. marshal, and on the 22d day of same month and year served a copy of within subpœna in chancery on J. Jeannaud, named herein, by handing the same to him in person.

New Orleans, November 24th, 1876.

(Signed) J. R. G. PITKIN,
U. S. Marshal.
By S. W. REED,
D'y U. S. Marshal.

Subpœna in chancery to J. Mandin.—Issued November 20th, 1876.

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the district of Louisiana, greeting:

18 You are hereby commanded to summon J. Mandin, a citizen of the State of Louisiana, to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of January, 1877, then & there to answer a bill in chancery filed against him and others wherein W. W. Johnson & Co., citizens of Ohio, are complainants, and said J. Mandin and others are defendants.

Herein fail not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 20th day of November, in the year of our Lord one thousand eight hundred and seventy-six, and the 101st year of American Independence.

[SEAL.] (Signed) J. B. VINOT,
D'y Clerk.

19 The defendant is hereby notified that he is required to enter his appearance in the clerk's office of the United States circuit court, on or before the first Monday of January, 1877, otherwise the bill may be taken pro confesso.

(Signed) F. B. VINOT,
D'y Clerk.

Marshal return thereon.

Received November 21st, 1876, by the U. S. marshal, and on the 22d day of same month & year served a copy of within subpœna in chancery on J. Mandin, named herein, by handing the same to him in person.

New Orleans, November 24, 1876.

(Signed) J. R. G. PITKIN,
U. S. Marshal.
By S. W. REED,
D'y U. S. Marshal.

Notice of application for injunction and return thereon.—Filed Nov. 21st, 1876.

[Clarke, Bayne & Renshaw, attorneys at law, No. 48 Camp street.]

NEW ORLEANS, *Nov. 20th*, 1876.

SIR: Please to take notice that on behalf of Messrs. W. W. Johnson & Co., of Cincinnati, Ohio, we have this day filed in the circuit
20 court of the United States for this district a bill of complaint, to which we call your attention, praying an injunction restraining you and others from contracting for, receiving, selling, or in any wise trafficking in whiskey having the brand, token, or trade-mark

which may be manufactured, sold or marked by Tyra Hill & Co., of St.

Louis, or their agents, or by their authority; that on Tuesday, the 21st November, 1876, we will apply to the said court for an injunction pendente lite.

Yours, truly,
(Signed) CLARKE, BAYNE & RENSHAW.

Henry Renshaw, jr., being duly sworn, deposes and says, the foregoing is a copy of notices served by me on Monday, November 20th, 1876, before 3 o'clock p. m. of said day, on the following parties:
21 Scherck & Berksen, by personal service on Louis Scherck, of said firm; J. Jeannaud, by personal service; J. Mandin, by personal service; Smith Bro's & Co., by personal service on J. B. Sinnott, of said firm; John T. Moore & Co, by personal service on Jno. T. Moore, jr., of said firm; Jos. Dreyfus, by personal service.

(Signed) HENRY RENSHAW, JR.

Sworn to & subscribed before me this 21st Nov., 1876.
(Signed) F. B. VINOT,
U. S. Comm'r.

Order granting injunction.—E'tract from the minutes, November term, 1876.

NEW ORLEANS, *Tuesday, November* 21, 1876.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

W. W. JOHNSON & CO.
vs.
SCHERCK & BERKSEN ET ALS. } No. 8008.

The application for an injunction in this cause came on to be heard; Clarke, Bayne & Renshaw, for applicants.

Defendants, tho' notified, not present.

22 When, upon due consideration of the allegations of the complainants' bill, it is ordered by the court that an injunction pendente lite issue restraining each of the defendants, their agents, servants and employees from contracting for, buying, selling, or otherwise trafficking in any whiskey upon which the trade-mark or token

shall be stamped or otherwise affixed by Tyra, Hill & Co., or their agents, and from placing upon any whiskey or packages thereof said trade-mark or token, until the court shall otherwise direct.

Injunction.—Issued November 21st, 1876.

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth judicial circuit and district of Louisiana. In equity.

W. W. JOHNSON & CO.
vs.
SCHERCK & BERKSEN ET ALS. } No. 8008.

The President of the United States to Scherck & Berksen, Smith Brothers & Co., John T. Moore & Co., Joseph Dreyfus, J. Jeannaud and J. Mandin, greeting:

23 Whereas it has been represented to us in our said circuit court on the part of W. W. Johnson & Co. by their bill of complaint lately exhibited against you and each of you touching certain matters and things therein set forth:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said Scherck and Berksen, Smith Brothers & Co., John T. Moore & Co., Joseph Dreyfus, J. Jeannaud and J. Mandin, and each of you, your attorneys, agents, servants and employees, and each of you, are hereby commanded and strictly enjoined under the penalty of the law that you absolutely refrain and desist from contracting for, buying, selling, or otherwise trafficking in any whiskey upon which the trade-mark or token

shall be stamped or otherwise affixed by Tyra, Hill & Co. or their agents, and from placing upon any whiskey or packages thereof said trade-mark or token until the court shall otherwise direct.

24 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New Orleans, this 21st day of November, in the year of our Lord 1876.

[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

Marshal's return thereon.

Received Nov. 22d by the U. S. marshal, and served copies hereof on the within-named persons as follows: Scherck & Berksen, 22nd, on Scherck personally; Smith Bro's & Co., 22nd, on J. B. Sinnott personally; John T. Moore & Co., 22d, on John T. Moore, jr., personally; Joseph Dreyfus, 23d, personally; J. Jeannaud, 22d, personally; J. Mandin, 22d, personally.

(Signed) S. W. REED,
D'y U. S. Marshal.

Amended bill of complaint.—Filed December 27th, 1876.

Circuit court of the United States in and for the fifth circuit and district of Louisiana. In equity.

W. W. JOHNSON & ALS.
25 *vs.*
SCHERCK & BERKSEN & ALS.

And now the complainants with leave of the court file their amended bill in the words & figures following:

The complainants allege that Geo. W. Kidd, a citizen of the State of New York, at the time of the purchase by Mills, Johnson & Co., from Samuel N. Pike, of the premises in Cincinnati, with the good will and trade-marks formerly in use by said Pike, was engaged in business with said Pike at said premises as a partner, having been taken into said business by said Pike with another, they having been formerly employees; that immediately after the said sale the said Pike and said Kidd and their associates removed from said premises, selling a part of the stock on hand of a merchantable character to said Mills, Johnson & Co., and shipping the remainder to the city of New York, where they had a place of business—leaving the said premises and the machinery for the
26 manufacture of magnolia and other brands of whiskey, the brands and other appurtenances in the hands of said Mills, Johnson & Co.

And your orators further aver, that at the time of said purchase of said Pike by said Mills, Johnson & Co., or shortly thereafter, the said Pike, averring that it was needful for his interest to continue his business in the city of New York for another year, in which he was engaged in conjunction with said Kidd and another, desired, notwithstanding his sale of all the good will of his establishment in Cincinnati aforesaid, to be at liberty to use the trade-marks there for that period of time, to which your orators assented. That said George W. Kidd under colour of his partnership relations with said Pike, and the said Pike having died, by claim of survivorship asserts not only his right to use said trade-marks mentioned in the original bill of complaint, upon goods manufactured by himself, but also to grant licenses to others to use the same. That under said asserted claim he *he* has granted to the said Tyra,
27 Hill & Co. a license to use said trade-marks upon barrels and packages either manufactured by them; that thereunder the said Tyra, Hill & Co. have sold in the markets of St. Louis, New Orleans, and other places in the south and southwest whiskey with brands of S. N. Pike's magnolia whiskey in exact and also colourable imitation of the brands transferred by said Pike to Mills, Johnson & Co.; that thereby the public are deceived and the trade of your orators injured. That said Geo. W. Kidd is no otherwise interested in said trade except from a royalty exacted from said Tyra, Hill & Co.

Your orators therefore pray your honor to grant unto them the writ of injunction against said George W. Kidd, Tyra, Hill & Co., & their associates and the persons named in bill of complaint, forbidding them or either of them from using in any manner whatever the said trade-mark of your orators, or a colourable imitation thereof; that in as much as large damages have been incurred by the hitherto wrongful inva-
28 sion of your orators' rights, to wit, ten thousand dollars, that an assessment of said damages be made under the orders and approval of the court, and judgment awarded in your orators' favor, and

your orators pray for such other and further relief and remedy as to right and justice pertains and the court can award.

May it please your honors to grant unto your orators a writ of subpœna to be addressed to George W. Kidd, , thereby commanding them at a certain time and under certain penalties therein to be limited, personally to appear before this court, and then & there (but not under oath, which is expressly waived & declined) full, true, direct, and perfect answers make to all and singular the premises, and further to stand to, perform and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

(Signed) CLARKE, BAYNE & RENSHAW,
Sol'rs for Compl'ts.

William W. Johnson, being duly sworn, deposeth and saith
29 that he is one of the complainants in this cause; that the allegations of the foregoing amended bill are true so far as the same are alleged upon his personal knowledge, and so far as alleged upon information and belief, he believes the same to be true.

(Signed) W. W. JOHNSON.

Sworn to & subscribed before me, Dec'r 27, 1876.

(Signed) K. LOEW,
Com'r C. Court.

Order thereon.

Let this amended bill be filed.
Dec'r 27th, 1876.

(Signed) EDWARD C. BILLINGS,
Judge.

Answer & cross-bill.—Filed December 27th, 1876.

U. S. circuit court, fifth circuit & dist. of Louisiana. In equity.

W. W. JOHNSON & CO.
vs.
SCHERCK & BERKSEN & ALS. } No. 8008.

The answer of George W. Kidd, a citizen of the State of New York, to the bill of complaint of W. W. Johnson & Co., and to the amended bill of complaint of said complainants.

30 The defendant now and at all times hereafter reserving all manner of benefit and advantage to himself of exception to the many errors and insufficiencies in said bill and amended bill contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto, he answers and says: Defendants admits that complainants are engaged in the business of distilling and vending spirituous liquors at Cincinnati, and that they are successors of Mills, Johnson & Co., and further admits that the last-named firm bought from S. N. Pike the premises in Cincinnati formerly occupied and used by the firm of S. N. Pike & Co. in their business as wholesale rectifiers & distillers of spirituous liquors, and which were so occupied until the said sale to said Mills, Johnson & Co., but defendant denies that by said purchase from S. N. Pike the said Mills, Johnson &

Co., or their successors, the complainants herein, acquired any right whatever to make and vend *vend* whiskey with the brand or trade-
31 mark affixed on the packages of whiskey of "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," as set forth in said bill of complaint and in said amended bill of complaint, for the reason that the said Pike was not the owner of said trade mark or brand, the same, together with all other brands and trade-marks used by S. N. Pike & Co. in their business in said Cincinnati, being the property of said S. N. Pike & Co., and not the property of S. N. Pike individually, and denies ever sold, or intended to sell, to Mills, Johnson & Co. the use of said trade-mark or brand with other trade-marks or brands at the time he sold to them the said premises in Cincinnati, which included the real estate, machinery, and fixtures in said premises, the said real estate, fixtures, &c., being the property of said S. N. Pike, but the said brands and trade-marks being the property of the firm of S. N. Pike & Co. at the time of said sale, and the said S. N. Pike individually was without authority to sell said brands, &c., or to make any contract or agreement extending the use thereof to said Mills, Johnson & Co. This de-
32 fendant admits that he and his firm did extend to the said firm of Tyra, Hill & Co., of St. Louis, the right to manufacture and sell the magnolia whiskey, to which packages of whiskey they were to attach the said trade-mark or brand, and that said Tyra, Hill & Co. have manufactured and sold said magnolia brand of whiskey to the various dealers in the city of New Orleans, as set forth and alleged in complainant's bill and amended bill; but defendant avers, and so the truth is, that he is the successor of the firm of S. N. Pike & Co., and was a member of said firm for many years presious to the sale by S. N. Pike of the real estate, machinery, and fixtures used by the firm of S. N. Pike & Co. in Cincinnati to Mills, Johnson & Co. Defendant further avers that the trade-mark "Magnolia" was originated by Henry Pike and was first adopted by the firm of S. N. & H. Pike many years ago; that after the withdrawal of Henry Pike from said firm S. N. Pike continued the business in his own name and continued to make and vend whiskey with said trade-mark, and subsequently with
33 Lawrence Myers founded the firm of S. N. Pike & Co. and continued said business under said firm name and style, and that after the withdrawal of said Myers from said firm of S. N. Pike & Co., S. N. Pike continued said business till the year 1864, when this defendant and Joseph Tilney became associated with said Pike, under the firm name of S. N. Pike & Co., and that said firm did business both in Cincinnati and New York, and continued to use said brand or trade-mark "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," together with many other brands in use by S. N. Pike and S. N. Pike & Co. previous to the formation of said firm in 1864; that said S. N. Pike & Co. took the only steps then known to the law to preserve their right to the exclusive use of said brands or trade-marks, by having them registered with the Librarian of Congress, the law as to trade-marks not being then in existence. And defendant further avers that after the sale by S. N. Pike of the real estate & fixtures occupied by said firm in
34 Cincinnati to Mills, Johnson & Co. the said firm continued to do business under said firm name in the city of New York, and continued the use of said trade-marks and other brands until the withdrawal of said Pike in May, 1872, and that after the withdrawal of said Pike, defendant, with J. H. Bristow, as successors of S. N. Pike & Co., under the firm name of Geo. W. Kidd & Co., continued the use of said trade-marks and brands up to the death of said Pike in December,

1872, and so continued to use said brands until the withdrawal of said Bristow, and that when said Bristow retired from said firm this defendant, as successor of *of* Geo. W. Kidd & Co. and of said S. N. Pike & Co., has carried on and continues to carry on business in said city of New York under said firm name and style of Geo. W. Kidd & Co., and has continued to use said brand and trade-mark, and did by agreement, in the month of October last, extend to Tyra, Hill & Co., of St. Louis, the right to make and vend said whiskey in the city of St. Louis
35 and in the Southwest, and to use upon packages of said whiskey the said brand and trade-mark, all of which doings this defendants asserts and alleges were legal and proper for him to do.

This defendant, further answering, saith that he has been informed and admits it to be true that, upon application by the complainants, registration was granted by the register of trade-marks in the Patent Office of the United States of an alleged trade-mark as described in said bill and amended bill of complaint. And this defendant further says that registration of said trade-mark as alleged in said bill was improperly granted to said complainant, and that subsequent to the registration thereof granted to said complainants, the firm of Geo. W. Kidd & Co., as successors of S. N. Pike & Co., the adopters of said brand or trade-mark, and rightfully entitled to the use thereof, applied to have said trade-mark as described in complainant's bill registered in the name of said firm of Geo. W. Kidd & Co. as the property
36 thereof, and to which firm said trade-mark lawfully belonged, and that on the trial before the Commissioner of Patents, in the matter of interference between Geo. W. Kidd & Co., application for registration of the trade-mark "Magnolia," as described in said bill, and "Dave Jones, Paris, Ky., Bourbon," and the same trade-marks so registered by Mills, Johnson & Co., the said Commissioner decided that the applicants Geo. W. Kidd & Co., were clearly entitled to the registration of said trade mark, which decision is hereto annexed and made part hereof. And this defendant, on information and belief, denies that by virtue of any such registration of the said trade-mark in said bill and amended bill mentioned, or otherwise, the said complainants became or ever were, or either of them ever was, possessed of any exclusive or other right to use the said alleged trade-mark in the said certificate of registration and bill of complaint described; and which matters and things this defendant is ready to aver and prove as this honorable court may direct, and prays
37 to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and that injunction wrongfully and illegally by complainant obtained be dissolved.

And this defendant, by way of cross bill complaining, showeth that your complainant is the exclusive owner and entitled to the exclusive use of the trade-mark S. N. Pike's Magnolia Whiskey, as the same is fully described in the bill and amended bill of complainants, W. W. Johnson & Co. And complainant further showeth that the firm of S. N. Pike & Co., and their successors, G. W. Kidd & Co., and this complainant, as a member of both said firms and as successor of said firms and to the rights of said firms to the use of said trade mark for more than twenty-five years before and at the time when the said W. W. Johnson & Co. filed their bill and amended bill of complaint in this honorable court against your orators and others, did manufacture,
38 vend, and sell, and continue to manufacture, vend, and sell large quantities of whiskey with said trade mark attached thereto, and that the said Pike had caused to be recorded according to law the said trade mark as the distinctive trade-mark of said firm, and that the said

firm of Geo. W. Kidd & Co., as successors of said firm, did, on or about , cause the said label or trade-mark to be registered according to the provisions of an act of Congress in that regard, and secured the rights to the same to said firm and to your orator as the successor of said firm, and the said firms of S. N. Pike & Co. and Geo. W. Kidd & Co. had gained and acquired great fame and reputation with the public on account of the excellent quality of the whiskey with said brand and trade-mark by them made, vended, and sold, and your complainant, as successor of said firms, has continued to manufacture whiskey of the same quality, and labeled the packages thereof with the mark aforesaid, and has acquired and obtained great gain and profit therefrom.

39 And complainant further showeth that he did, on or about the month of October, 1876, by agreement with Tyra, Hill & Co., and for a valuable consideration, authorize and duly extend to said firm to manufacture and vend the same quality of whiskey and use said label on packages with said trade-mark, and that said Tyra, Hill & Co. were manufacturing and selling said brand of whiskey in large quantities in the market of New Orleans, and that complainant in this cross-bill has acquired and gained great profit and gain from the sale of said whiskey by said Tyra, Hill & Co., and would have continued to gain large profits from the sale thereof if he and the said Tyra, Hill & Co. had not been restrained from selling said whiskey with said mark by the bill and amended bill of said W. W. Johnson & Co., and that the said restraining order obtained by said complainants, W. W. Johnson & Co., has caused to your orators in this cross-bill damages in the full sum of twenty thousand dollars.

40 Your orator in this cross-bill therefore prays your honors that the restraining order obtained by the said complainants, W. W. Johnson & Co., against Tyra, Hill & Co. and your orator and others, be dissolved and set aside. And your orator further prays your honors to grant unto him the writ of injunction against said W. W. Johnson & Co., forbidding them from using in any manner the said trade-mark of your orator or a colourable imitation thereof, and inasmuch as large damages have been incurred by the hitherto wrongful invasion of your orator's rights, to wit, the sum of twenty thousand dollars, that an assessment of said damages be made under the order and with the approval of this honorable court and judgment be rendered for that sum in your orator's favor; and your orators pray for such other and further relief and remedy as to right and justice pertains and the court can award. and your orators will ever pray, &c.

(Signed) LABATT, ARONI & CLINTON,
Solicitors.

41 (Signed) JULIUS ARONI,
Of Counsel.

Julius Aroni, being duly sworn, says that all the facts set forth in the foregoing answer are true.

Sworn to & subscribed before me this 27th Dec'r, 1876.

(Signed) K. LOEW,
Com'r C. Court.

Admission & agreement.—Filed December 27th, 1876.

U. S. circuit court, fifth circuit & dist. of Louisiana.

W. W. JOHNSON & CO.
vs.
SCHERCK & BERKSEN & ALS.

It is admitted and agreed that the following are the facts upon which this case is to be tried:

I. W. W. Johnson & Co. are the successors of Mills, Johnson & Co., and entitled to all the rights of said firm to trade-marks.

II. After S. N. Pike sold his property on Sycamore street, Cincinnati, to Mills, Johnson & Co., ceased to do business in Cincinnati,
42 but continued their business as before in the city of New York.

III. G. W. Kidd & Co. are the successors of S. N. Pike & Co., and G. W. Kidd now carries on the same business in the city of New York as successor of G. W. Kidd & Co.

IV. The printed evidence used in the trial of interference to be used on the trial of this cause, and all the objections raised therein, and all other legal objections thereto considered raised in this cause.

V. The answer and defense of G. W. Kidd is considered the answer & defense of all the defendants in complainant's original and amended bills.

VI. To avoid unnecessary litigation, the present case is considered a test-case to settle the questions whether W. W. Johnson & Co. or G. W. Kidd have the exclusive right or joint right to the use of the brands mentioned in the bill, and whether the party having the right can assign to others the right to manufacture the same article and to affix thereto the same trade-marks.

43 VII. The decisions of the examiner and of the Commissioner of Patents are considered as properly certified, but their legal effect not admitted.

VIII. It is agreed that the original and amended bills of complaints shall be taken as answer to cross-bill of defendants, and that no formal replication need be filed.

(Signed) CLARKE, BAYNE & RENSHAW,
Sol'rs for Comp'ts.

(Signed) LABATT, ARONI & CLINTON,
For Respondent.

Proceedings before examiner of trade-marks.—Filed December 27th, 1876.

UNITED STATES PATENT OFFICE.

In the matter of two interferences between the application of George W. Kidd & Co. for the registration of trade-marks "Magnolia" and "Dave Jones," and the said marks as registered by Mills, Johnson & Co., for whiskey.

Before the examiner of trade-marks.

This matter, involving the title to the trade-marks "Magnolia"
44 and "Dave Jones" are respectively the essential elements, was brought on for hearing December 18th, 1873, and was ably argued by A. J. Todd, esq., for the applicants, and William M. Ramsey, esq., for the registrants.

The application made by George W. Kidd & Co. in each case had been rejected, for the reason that Mills, Johnson & Co. had previously caused said marks to be registered in this office as their property (certificates Nos. 241 and 461). Whichever party has the title to said marks must have derived it from Samuel N. Pike, who died before this controversy arose. As a preliminary question it is necessary, therefore, to inquire whether Pike ever had the exclusive right of use in said mark as his sole and absolute property; that point must be conceded to without hesitation. The "Magnolia" mark was adopted by the firm of S. N. & H. Pike in or about the year 1854; and the "Dave Jones" mark was adopted by the same firm in or about the year 1854 (Kidd's ans. 20), as is shown by the evidence. That firm was dissolved in or about the year 1862, after which time Samuel N. Pike continued
45 the business and the use of said marks on his own account, the other members having quit the business entirely. It is not worth while to seek to ascertain the exact foundation of S. N. Pike's title, for whether he held as successor of the firm or as a new *a* adopt*o*r by means of abandonment by the original firm, the result is the same. He used the said marks, and no one else asserted any claim to them. The absolute title was, therefore, in Samuel N. Pike, as a sole trader, when, on the 15th of October, 1864, he became one of the firm of S. N. Pike & Co. This is not disputed, but is admitted by counsel on both sides. Did Samuel N. Pike, the sole owner of said marks, ever transfer his individual and exclusive property in them? It is shown that in the year 1864 (Kidd's ans. 21) a new firm was formed, consisting of S. N. Pike, J. M. Tilney, and Geo. W. Kidd, who continued the use of said marks in their business. We do not find satisfactory evidence that Pike gave or sold to the firm any right in said marks beyond that
46 of using them. The partnership agreement (Ex. 1, p. 54, of Mills, Johnson & Co., test.) is silent on that subject. Kidd says that they were understood to be included the sale to the new firm (ans. r. d. int. 81); but Tilney, the other member, says (ans. x-int. 41) that when he retired from the firm in 1867 he did not receive or claim to receive anything on account of either of said trade-maks; and in no part of the testimony is it said or implied that he supposed that the firm had a title to the ownership of the said marks. He says (ans. to x-int. 14 et seq.) that none of the partnership funds were ever used in purchasing either of said marks, and that no conveyance of the same was made to either himself or Kidd by any legal instrument, to his knowledge; and by a witness for the registrants (Moore, ans. 13) it is shown that Mr. Tilney said in 1869 that Kidd was unreasonable in his demands and that he ought not to use brands. Beyond all doubt Mr. Tilney never thought that he had an individual right in said marks. He further says
47 (ans. to x-int. 22) that he never heard Mr. Kidd make any claim of title in either of said marks during the time he was a copartner with him in the firm of S. N. Pike & Co. We may with great reason assume that if the firm believed themselves such to be the owners of said trade-marks, which e*v*an at that time had a high value, something would have been said of them in the inventory or on settlement at the dissolution, for when Tilney quit business the firm had expired by limitation. (Kidd's ans. to x-int. 34; and articles of co-partnership Ex. 1, M. J. & Co.) From the evidence we cannot well fail to deduce this conclusion: When the firm of S. N. Pike & Co. expired in 1867, Pike was deemed by himself and by his copartners to be the sole owner of the trade-marks as fully as he was of the real estate and fixtures by means of which the business was carried on. We find S. N. Pike sole

owner of the trade-marks in 1867. A new firm was then formed,
48 consisting of Pike & Kidd, under the old commercial name of S. N. Pike & Co. In the year 1868 (October 1), while that firm was still in business, S. N. Pike conveyed to Mills, Johnson & Co. his real estate, and transferred "all the stills, tubs, engines, boilers, and tubing, together with all apparatus connected therewith, used in my (his) distellery, situate on east side of Sycamore street, 18 and 20, Cincinnati, Ohio" (Exhibit 3, p. 56 of M. J. & Co.'s case). This was the property, real and personal, used by the firm; and there is no denial that the full and absolute estate was in Pike, subject to his wife's dower in the realty. On the same day, October 31st, 1868, a memorandum was made on the bottom of Exhibit 3, in the letter-press copy-book of the firm (p. 21 of M. J. & Co.'s case), as follows: "Having sold to Messrs. Mills, Johnson & Co. my premises No. 18 and 20 Sycamore street, I hereby extend to them and their successors the use of all my brands formerly used by me in my Cincinnati house. (Signed) Samuel N. Pike, Cincinnati,
49 October 1, 1868." This is the testimony of one of Pike's executors. Pike must at that time have regarded himself as the sole owner of the brands among which were "Magnolia" and "Dave Jones," or he would not have made the transfer in his individual name. It is true, as admitted by the registrant's counsel, that this paper imports on its face only a perpetual license. But if it was found to have a legal existance for any purpose, as a license or as an assignment for a valuable consideration or was a gift, then, as a necessary consequence, Pike must have been sole owner at the time, for, be it observed, he does not use the firm name but his own. Pike could not divest the firm of property by such an instrument. The firm then consisted of Pike and Kidd. How could Kidd have failed to know of the transaction? That he both knew of it and recognized its regularity is manifest from the evidence. It may be asked in this place, if Pike on the first of October, 1868, transferred the ownership of the two trade-marks in controversy to Mills, Johnson & Co., how was it that his firm subsequently
50 continued the use of them in their New York house? The theory of the registrant's counsel is that the marks were transferred to them, subject to the reserved right of Pike to use them for a limited time. That is probably correct. Johnson, one of the firm of the registrants, testifies thus (ans. 24): "Mr. Pike said he expected to retire from business in New York in about one year. I said, 'Now Mr. Pike, I want to ask you one question. (This is the exact language.) Who owns these brands exclusively when you retire from business and are done with them?' His answer was, 'Mills, Johnson & Co., and you may do what you are a mind to with them.' That was his precise language and words." J. F. Mills, another member of the firm, corroborates this testimony (ans. 13), so does C. L. Mills (ans. 2). Witness Schwarzenberg (ans. 3) testifies that in 1872 Pike said that the brand of "Dave Jones" belonged to Mills, Johnson & Co., and said he would have nothing to do with the "Magnolia" brand. Another witness, Moore (ans. 3),
51 testifies to a business conversation with Pike in the presence of his partner, Kidd, in 1869, when Pike stated that it was true that he had sold these brands for a valuable consideration, and he thought Mills, Johnson & Co. were right in their demand that their use should be discontinued by the New York house of S. N. Pike & Co. Kidd objected that he had received no part of the consideration of that sale, and he would do as he pleased as to their use.

It seems thus far that Pike had not only sold his marks to Mills,

Johnson & Co., but that he always so understood, being himself nothing beyond a mere license'. But there is some very slight testimony that he held a view to the contrary. For instance, there is Exhibit A, of the applicant's case, that is a list of trade-marks files with the county clerk, the "Magnolia" mark being among them. There is an affidavit to said list by one John S. Kidd, who deposed that he was agent for S. N. Pike & Co. It reads that the marks mentioned "are used by said
52 firm to designate and mark certain brands and symbols of their manufactnre; that the said trade-marks are not in use by any other person or persons to the said firm or this deponent known." That statement was not true; for it was well known by the firm that Mills, Johnson & Co. had all along been using the "Magnolia" brand. Exhibit B contains only the "Dave Jones" mark; but the same person swore that "the same is not in use by any other person or persons to this deponent known." That was also untrue. That was in 1869. It was either gross carelessness or an intentional falsehood. George W. Kidd knew all the facts; why did not he make the oath? If when he found that a mistake had been made by another, why does he now rely upon that mistake? Neither member of the firm could truthfully say that no other person or persons then used the marks. Therefore we must assume that neither would have made the affidavit. The
53 rule is always that the best witness must make oath. Why was that left to one ignorant of the fact, if he was ignorant? The testimony that Pike assented to such filing has little if any weight. He did not especially mention any mark, so far appears, and suppose he had intended to include these particular marks among the many others; that would not help the applicants' case, for we find incontrovertible evidence that he had permitted Mills, Johnson & Co. to use these marks and that they continued to use them as marks for whiskey. As a circumstance to prove the purchase of the said trade-marks for a valuable consideration Mills, Johnson & Co. adduce testimony as to the value of the real estate and personal property purchased by them from Pike, but that need not be deeply inquired into. Whether the consideration was large or small, or whether the property in the marks was a gift, the title passed to them and no subsequent act of Pike could divest that title.

54 Another view may be taken of this case. If for the sake of argument it be admitted that the title is not in Mills, Johnson & Co., and that S. N. Pike retained sole title in himself up to the time of his death, then it must have passed to his executors, and they, if anybody, should be the applicants for registration. But such a hypothesis cannot be entertained for one moment. The executors despel the idea by testimony. Adopt the theory of the applicant's counsel that at the time of Pike's death his firm owned the marks, and how stands the case? A dissolution of the partnership took place by law upon the death of Pike, in 1872, unless the articles of copartnership, or other agreement, stipulated to the contrary. (Story on Partnership, s. 319 a.) There was no such agreement. The evidence clearly shows that the partnership interests terminated with that death. Assuming that the firm
55 S. N. of Pike & Co. had any sort of ownership in said trade-marks when it was dissolved by his death, there is not the slightest evidence that the new firm of Geo. W. Kidd & Co. took title. It is a universally established principle of the whole commercial world that the property and effects of a partnership do not belong to the surviving partners, but they are to be distributed between them and the representative of the deceased in the same manner as

they would have been upon a voluntary dissolution inter vivos. (St. Part., § 342.) But personal representatives of Pike do not make any claim that any interest in said marks belong to the estate. They are not before the office as a party, which they should be if the last firm of S. N. Pike & Co. owned the marks, for the executors would in that case be tenants in common with the surviving partners of all partnership property and effect in possession. (Id., § 346.) The survivors of the firm would be entitled to close up the office of the firm to receive
56 and discharge debts, but they would not take proprietary interest as in a case of joint tenancy.

The applicants, Geo. W. Kidd & Co., have not shown that they have a right to the use of the said trade-marks "Magnolia" and "Dave Jones," and that no other person or firm has such a right as is required by section 77 of the registration law of July 8th, 1870.

Therefore the claim of said George W. Kidd & Co. to be adjudged the of said trade-marks being found to be untenable, a judgment of right to registration must be denied.

Washington, D. C., January 6, 1874.

(Signed) WM. H. BROWNE,
Examiner of Trade-marks.

Ex'd. J. M. B.

Opinion of the Commissioner.—Filed December 27th, 1876.

CAUTION TO PURCHASERS OF "DAVE JONES" AND "MAGNOLIA" WHISKIES.

57 Copy of report of Commissioner of Patents, Washington, as to our right of patent and ownership. We also call attention to fac similes of our brands on the reverse side, of which we hold patents. All parties infringing on our rights will be held responsible.

(Signed) GEO. W. KIDD & CO.

Commissioner's decision.

Kidd & Co. and Mills, Johnson & Co.—Interference.

[Appeal from the examiner of trade-marks in the matter of the interference between the application of George W. Kidd & Co. for registration of trade-marks "Magnolia" and "Dave Jones," and the registered trade-marks of Mills, Johnson & Co. Decided March 28, 1874.]

1. Property in a trade-mark is secured and continued by adoption and use of the mark in connection with a particular manufacture.

2. In the absence of any express disposition of the trade-marks of a firm when the firm is dissolved, the right to them must be settled by operation of law.

58 3. When a person permanently ceases to use his trade-mark, and consents to its adoption and use by another, he relinquishes his right to it.

4. The same result follows when a firm discontinues the use of a trade-mark and a member of the firm succeeding to the business continues its use.

5. Where A and B as partners adopted and used certain trade-marks, and A withdrew from the firm, never set up any claim, but left *he* to carry on the business and use the trade-mark exclusively in his individual capacity: held that an exclusive right to the same vested in B

and when B afterward acquiesced in the exclusive use of the marks by a firm, the right to them vested in the firm.

LEGGETT, *Commissioner:*

It appears that the firm of S. N. and H. Pike adopted the words "Magnolia" and "Dave Jones" to designate certain brands of whiskies which they manufactured previous to 1854. In that year H. Pike withdrew from the business, and it was carried on by S. N. Pike alone
59 for three or four years, when Lawrence Myers, joined him and continued in the firm of S. N. Pike & Co. until 1861 or 1862. Then Myers withdrew, and S. N. Pike again conducted the business alone and in his own name until October, 1864. At that time another firm of S. N. Pike & Co. was formed, which consisted of S. N. Pike, Joseph Tilney, and George W. Kidd. This firm did business both in New York and Cincinnati. Mr. Tilney withdrew in 1867, and Pike and Kidd formed a partnership and continued the business as S. N. Pike & Co. They appear to have been strongly drawn by their interest to New York City; and accordingly, in 1868, Mr. Pike, in his individual capacity, sold (Ex's 3, 6, and 7) the realty, appurtenances, fixtures, machinery, and apparatus used by the firm in Cincinnati, but owned by him, to Mills, Johnson & Co. This firm took up the business in Cincinnati and continued it, and Pike & Co. removed to New York and con-
60 tinued their business there until January, 1872, when Isaac Bristow was associated, the style of the new firm still remaining S. N. Pike & Co. In December, 1872, Mr. Pike died, and afterwards the surviving partners, under the style of Geo. W. Kidd & Co., continued the New York business, and are now the applicants claiming the title to the trade-marks in question and seeking their registration. Mills, Johnson & Co. have already registered these trade-marks. It is obvious that, in whichever of the parties, if in either, the legal right to the trade-marks subsists, it must have been derived from S. N. Pike. Mills, Johnson & Co. claim it by right of purchase from Pike, and Kidd & Co. by right of survivorship and successorship to the firm of S. N. Pike Co. The matter of title derived from Pike is the only question involved. It must be inquired, first, to whom the trade-marks belonged in 1868 at the time of the sale of the Cincinnati property to Mills, Johnson & Co., and whether they were conveyed to that firm;
61 and, second, if they were not conveyed to that firm, whether the right to them continued in Pike, and is, therefore, now in his personal representatives, as held by the examiner of trade-marks, or whether it ultimately passed by survivorship, adoption, and use to the successors and surviving partners of the last firm of S. N. Pike & Co. In none of the agreements by which the various partnerships with Pike were formed does it appear that these trade-marks were ever referred to or reckoned as part of the partnership property. They were used substantially as originally adopted, by S. N. and H. Pike—by S. N. Pike and by the various firms he formed from time to time by taking other men into his business with him. In the absence of any express disposition of the trade-marks, the title to them must be settled by operation of law. Upon the withdrawal of H. Pike, from the original firm, and the continuation of the business and use of the trade-
62 marks by S. N. Pike, as the successor of the firm, there can be no doubt that the title to the trade-marks became vested in S. N. Pike, by operation of law. The cases of Lewis vs. Langdon, 7 Simmons, 421; Croft vs. Day, 7 Beav., 84; Hine vs. Dart, 10 Lond., Jur. Rep., 106, and Edlestone vs. Vick, Eng. Law and Eq. R., 51,

see a to settle this point. Property in a trade-mark is secured and continued by adoption and use of the mark with reference to a particular manufacture, and when an individual permanently ceases to use his trade-mark and consents to its adoption and use by another, he relinquishes his right to it. The same result follows when a firm discontinues the use of a trade-mark, and a member of it succeeding to the business continues its use. When S. N. Pike ceased the use of these trade-marks as an individual and consented to their adoption and use by the firm of which he became a member, the right to the trade-mark passed to the firm. In my opinion, the title to these trade-marks was not in Pike, in 1868, at the time of the sale of the Cincinnati pro-
63 perty to Mills, Johnson & Co., but in the firm of S. N. Pike & Co., who had adopted and were exclusively using them with Pike's consent. Pike could not, therefore, in his individual capacity, convey it to Mills, Johnson & Co., nor, in fact, is the evidence entirely clear that he intended to convey it. The consideration expressed in the deed given for the premises by Pike and his wife is $100,000, and that for the stills, tubs, engines, boilers, tubbing, and apparatus expressed in the memorandum of sale signed by Pike is $25,000. Nothing appears in the Exs. 3 or 7 to indicate that the good-will of the business of S. N. Pike & Co., or the trade-marks in question, either as his individual property or that of the firm, were conveyed to Mills, Johnson & Co., or that the consideration for the transfer of the property related to anything more than the corporeal things enumerated in these exhibits. But in connection with the transaction the following memorandum occurs:

64 Having sold to Messrs Mills, Johnson & Co. my premises, No. 18 and 20 Sycamore street, I hereby extend to them and their successors the use of all my brands formerly used by me in my Cincinnati house.

SAM'L N. PIKE.

CINCINNATI, *October* 1, 1868.

This was made under the memorandum of sale on the day of the sale, and signed by Pike. It imports a mere license given after the sale was consum'ated. It is not an agreement amounting to a contract of sale between the parties; and neither is the memorandum of the sale itself. (Ex. 3.) There was no such contract made between the parties in writing. The business seems to have been conducted orally, and the deed of the realty was made in pursuance of the oral agreement or "understanding" of the parties. It is manifest, from Ex. 3, that Pike intended to give a license to Mills, Johnson & Co. to use these trade-marks, but this is only a piece of evidence relating to the transaction be-
65 tween the parties, like the testimony relating to the value of the realty independent of the good-will and trade-marks. If it were not clear to my mind that the title was not in him at the time, but in the firm of S. N. Pike & Co., I should think it necessary to review with care all the evidence relating to the agreement between the parties, but I think Mills, Johnson & Co. can have no title, no matter what Pike might have supposed he owned and sought to convey. If I am correct, at the time of Pike's death the title to these trade-marks was in the firm of which he was a member. The applicants, Geo. W. Kidd & Co., being the survivors of that firm, and having continued the business and the use of the trade-marks, their right to registration is clear.

The decision of the examiner is reversed.

66 *Books O and P.—Filed December 27, 1876.*

Originals annexed as per agreement, filed March 21st, 1877.

67 *Note of evidence.—Filed December 27th, 1876.*

W. W. JOHNSON & AL. vs. SCHERCK & AL. } No. 8008.

Mem. of documents filed this day on the hearing of the cause.

Amended bill.
Answer to same.
Admission & agreement.
Opinion of the comm'r read by the defts. as part of the answer.
Proceedings before the examiner of trade-marks offered by complainants.
2 printed records, O & P, are filed in evidence.
All testimony and exhibits on file are considered as offered.

Hearing and submission of application for injunction.—Extract from the minutes of Dec. 27, 1876.

W. W. JOHNSON & CO. vs. SCHERCK & BERKSEN ET AL. } 8008.

68 This cause came on to be heard upon the bill, amended bill, answer, and cross-bill, exhibits, testimony, agreement, and admission, and question of injunction; was argued by Messrs. Clarke, Bayne & Renshaw, and Edgar M. Johnson for complainants, and Labatt, Aroni, and Clinton for defendants. Whereupon the court took time to consider.

Decree.—Extract from judgment book.

Circuit court of the United States, fifth circuit and district of Louisiana.
November term, 1876.

NEW ORLEANS, *Tuesday, January 9th*, 1877.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

W. W. JOHNSON & CO. vs. SCHERCK & BERKSEN ET ALS. } No. 8008.

69 This cause came on to be heard upon the bill, amended bill, answer, and cross-bill, exhibits, depositions, agreement, admission and motion for an injunction, and was argued by counsel. On consideration whereof, for reasons assigned in writing, it is ordered and decreed that the injunction prayed for in the complainants' bill and amended bill of complaint be granted; and that a writ of injunction in due form of law do issue against the said defendants Scherck & Berksen, Smith Bros. & Co., Jno. T. Moore & Co., Joseph Dreyfus, J. Jeannaud,

and J. Mandin, their attorneys, agents, servants, and employees; and that they be perpetually enjoined and inhibited from contracting for, buying, selling, or otherwise trafficking in any whiskey upon which the trade-mark or token

shall be stamped or otherwise affixed by Tyra, Hill & Co., or their agents, and upon placing upon any whiskey or packages thereof said trade-mark or token, and that the defendants Geo. W. Kidd, and Tyra, Hill & Co., and their associates, as well as the other defendant mentioned above, be severally perpetually enjoined and inhibited
70 from using in any manner whatever the said trade-mark, or token, or a colorable imitation thereof.

It is further ordered that the matter be referred to M. M. Cohen, esq., master, to take testimony upon notice, and report the amount of damage which the complainants have sustained.

Decree rendered January 9, 1877.

Decree signed January 13th, 1877.

(Signed) EDWARD C. BILLINGS, *Judge.*

Entry at January rules, 1877.—*Appearance of J. Mandin.*

MONDAY, 15*th inst.*

W. W. JOHNSON & CO.
vs.
SCHERCK & BERKSEN & AL. } 8008.

J. Mandin, one of the defendants, has this day by his solicitor Alphonse Canonge, entered his appearance to complainants' bill.

Motion for appeal—Filed January 18*th*, 1877.

71 U. S. circuit court, dist. & circuit of La. In equity.

W. W. JOHNSON & CO.
vs.
SCHERCK & BERKSEN & AL. } No. 8008.

On motion of Labatt, Aroni & Clinton, solicitors for defendants, and complainants in cross-bill, and on representing that said defendants and complainants in cross-bill are informed, and believe, that there is error to their prejudice in the final judgment rendered in this case on the 9th day of January, 1877, and signed on the , 1877, and that the matter in dispute exclusive of costs exceeds the value of five thousand dollars, and involves the ownership of a trade-mark, and defendants and complainants in cross-bill desire an appeal from said judgment, it is ordered that defendants and complainants in cross-bill be allowed an appeal not to operate as a supersedeas to the Supreme Court of the United States from the final judgment herein rendered on their giving

bond and security, as required by law, in the sum of ($500) five
72 hundred dollars, and that the appeal be made returnable to the Supreme Court of the United States on the 2nd Monday of October, 1877.

Agreement.—Filed February 27th, 1877.

U. S. circuit court.

W. W. JOHNSON & Co.
vs.
SCHERCK & BERKSEN & AL. } No. 8008.

It is agreed between complainants and defendants that—

1. The complainants waive the damages referred to in the judgment rendered in this cause without prejudice to their right to recover damages in other proceedings, if they have any such right;

2. That the reference to M. M. Cohen, esq., to ascertain such damages be dispensed with;

3. That the judgment perpetuat g the injunction and decreeing to complainants the exclusive right to use the brands and trade-marks be signed and made final;

4. That thereupon the respondents may obtain an order of ap-
73 peal to the Supreme Court of the United States on their giving bond in such an amount as the court may fix, sufficient to cover all costs, said appeal not to act as a supersedeas.

(Signed) CLARKE, BAYNE & RENSHAW,
Sol's for Comp'ts.

(Signed) LABATT, ARONI & CLINTON,
Of Counsel for Defendants.

Bond for appeal.—Filed March 15th, 1877.

UNITED STATES OF AMERICA:

Know all men by these presents that we, George W. Kidd, as principal, and Julius Aroni, as surety, are held and firmly bound, jointly and severally, unto W. W. Johnson & Co. in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said W. W. Johnson & Co., their heirs, executors, administrators, and assigns, for which payment well and truly to be made we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals,
74 and dated the fifteenth day of March, in the year of our Lord eighteen hundred and seventy-seven.

Whereas the above-bounden Geo. W. Kidd has this day presented a petition to the honorable the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, praying for an appeal to the Supreme Court of the United States from a certain judgment rendered in a certain suit, styled "W. W. Johnson & Co. vs. Scherck & Berksen et als.," which judgment was signed on the 13th day of January, 1877, at the term then being holden in and for the said district and circuit of Louisiana: Now the condition of the above obligation is, that we, the above-bounden George W. Kidd and Julius Aroni, will well and truly pay to the said W. W. Johnson & Co., the plaintiffs in said suit, all such damages as they may recover against us

in case it should be decided that the said appeal was wrongfully obtained.

(Signed) GEO. W. KIDD. [L. S.]
Labatt, Aroni & Clinton, Att'ys.
(Signed) JULIUS ARONI. [L. S.]

Signed, sealed, & delivered in the presence of—
THOS. P. CLINTON.

Bond approved.
(Signed) EDWARD C. BILLINGS,
Judge.

75 *Agreement.—Filed March 21st, 1877.*

U. S. circuit court, district and circuit of Louisiana. In chancery.

W. W. JOHNSON & Co.
vs.
SCHERCK & BERKSON & AL. } No. 8008.

It is agreed by the appellant and the appellees that the printed documents and evidence contained in the two books filed and used on the trial of this cause in the circuit court be not copied in the record to be filed in the Supreme Court of the United States, to which court an appeal has been taken, but that said printed matter go as such with the record and be considered a part of the same.

New Orleans, March 21st, 1877.

(Signed) CLARKE, BAYNE & RENSHAW,
For Comp'ts.
(Signed) LABATT, ARONI & CLINTON,
For Respondents & Appellants.

76 UNITED STATES OF AMERICA.

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 75 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of W. W. Johnson & Co. vs. Scherck & Berksen et als., No. 8008 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 20th day of July, A. D. 1877.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 20th day of July, A. D. 1877.

EDWARD C. BILLINGS, *Judge.*

77 O.—*Filed in evidence, Dec'r 27, '76. F. B. Vinot, d'y cl'k.*

Before the Commissioner of Patents.

8008.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "S. N. Pike, Magnolia whiskey, Cincinnati, Ohio," and application of Geo. W. Kidd & Co.

SIRS: Please take notice that on Wednesday, October 22, 1873, at the office of A. J. Todd, esq., 37 Park Row, New York City, at eleven o'clock in the forenoon, we shall proceed to take the testimony of Isaac Bristow, of Brooklyn, N. Y., G. W. Kidd, of New York City, and others, as witnesses in our behalf.

The examination will continue from day to day until completed. You are invited to attend and cross-examine.

G. W. KIDD,
ISAAC BRISTOW,
Firm of Geo. W. Kidd & Co.,
By MUNN & CO., *Attorneys.*

To Messrs. MILLS, JOHNSON & CO.,
18 *and* 20 *Sycamore street, Cincinnati, Ohio.*
Dated New York, Oct. 15, 1873.

STATE OF OHIO, HAMILTON COUNTY, *ss:*

Leonidas H. Swormstedt makes oath and says that he served Mills, Johnson & Co. by leaving a copy of within notice with William M. Ramsey, personally, one of the law firm, Matthews, Ramsey & Matthews, attorneys of record at Cincinnati, Ohio, and the attorneys of said
78 Mills, Johnson & Co., on this 18th day of October, 1873, at twelve and one-half o'clock p. m.

L. H. SWORMSTEDT.

Sworn to and subscribed before me this 18th day of October, 1873.

CHARLES BIRD,
Notary Public, Hamilton County, Ohio.

Before the Commissioner of Patents.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "S. N. Pike, Magnolia Whiskey, Cincinnati, Ohio," and application of Geo. W. Kidd & Co.

Depositions of witnesses examined on behalf of George W. Kidd & Co., pursuant to the annexed notice, at the office of A. J. Todd, esq., No. 37 Park Row, in the city of New York, on Wednesday, the 22d day of October, A. D. 1873, at eleven o'clock a. m.

A. J. Todd, esq., present as counsel for applicants, George W. Kidd & Co., and Mills, Johnson & Co. present by Ph. Chase, their counsel.

Adjourned to Thursday, Oct. 23, at eleven o'clock a. m., at the same place.

THURSDAY, *October* 23, 1873.

Met pursuant to adjournment; parties present as before.

GEORGE W. KIDD, being produced and duly sworn as a witness on behalf of George W. Kidd & Co., in answer to questions proposed to him by A. J. Todd, esq., counsel for said George W. Kidd & Co., testifies as follows:

Int. 1. What is your name, age, residence, and occupation?

79 Ans. 1. My name is George W. Kidd; I am thirty-eight years of age; reside in New York City; am a wholesale liquor dealer.

Int. 2. Are you a member of the firm of George W. Kidd & Co., which firm has applied for registration for the trade-mark now in controversy?

Ans. 2. I am.

Int. 3. When did you first, as a member of that or any other firm which your present firm is a successor of, adopt such trade-mark?

Ans. 3. In 1864, when I was taken partner into the firm of S. N. Pike & Co.

Int. 4. Of whom was that firm composed in that year, and what firm did it succeed, and when?

Ans. 4. The firm was composed of Samuel N. Pike, Joseph Tilney, and myself; it succeeded Samuel N. Pike, I think from about the middle of October, 1864.

Int. 5. Where was the business of the firm so organized carried on?

Ans. 5. In Cincinnati and New York.

Int. 6. Have you continued in the use of such trade-mark since the year 1864? If so, state under what firm name or names.

Ans. 6. Yes; under the names of S. N. Pike & Co., until 1867, when Joseph Tilney withdrew from the firm; then the same firm-name with Pike and myself till January, 1872, when we associated Mr. Isaac Bristow; then under the same firm-name until S. N. Pike's death, December 7, 1872. The style of the firm was not changed until May, 1873, but the firm was conducted by Mr. Bristow and myself, who were surviving partners; since then, as George W. Kidd & Co. The interest of S. N. Pike ceased at the time of his death.

Int. 7. At the time that you associated yourself with Mr. S. N. Pike and Joseph Tilney in the year 1864, as you testified, what interest in his business brands and trade-marks did you receive?

80 Ans. 7. Tilney and myself were associated with Mr. Pike as general partners in the manufacture of whiskey under various valuable trade-marks. The brands having established a reputation for his business, our interest would have been of no value if denied the benefits of them; on such basis we associated ourselves with him as partners.

(Objected to by counsel for Mills, Johnson & Co., as to that part of the answer after the words "trade-marks, the brands, etc.," as irresponsive to the question, and irrelevant, and argumentative.)

Int. 8. Was there any understanding or agreement with S. N. Pike to effect that yourself and Mr. Tilney, and subsequently yourself and Mr. Bristow, were to have simply an interest in the profits of the business of S. N. Pike?

Ans. 8. None whatever.

Int. 9. Was there ever any money value set on this trade-mark or brand in question by S. N. Pike in his lifetime?

Ans. 9. Not during my connection with him.

Int. 10. Who is the executor or administrator of the estate of S. N. Pike, deceased?

Ans. 10. Joseph Tilney, Samuel Craighead, and others.

Int. 11. Do you know or have you ever heard how this brand or trade-mark was originated, and by whom adopted in the first instance? If so, state what you know or have heard about it.

(Question as to hearsay objected to.)

Ans. 11. The brand or trade-mark being established years before my connection with the house, I can only state upon information and belief. Henry Pike asserts that he designed and introduced it.

(The last part of the answer, "Henry Pike asserts that he designed and introduced it," objected to as hearsay.)

Int. 12. Do you know or have you heard what person or firm adopted the trade-mark in the first instance?

(That part of the question as to what the witness has heard objected to as hearsay.)

81 Ans. 12. I believe S. N. & H. Pike was the style of the firm when the brand was introduced, about twenty-five years ago.

(Answer objected to as being a statement merely within his belief, without his knowledge.)

Int. 13. Who so informed you?

Ans. 13. Henry Pike.

Int. 14. Where is Henry Pike now?

Ans. 14. I believe in Western Virginia.

Int. 15. How did the brand or trade-mark then read?

Ans. 15. "S. N. &. H. Pike's Magnolia Whiskey, Cincinnati, Ohio."

Int. 16. How long did that firm, S. N. & H. Pike, continue to exist and to use said brand or trade-mark?

Ans. 16. Until the withdrawal of Henry Pike from that firm, about 1853 or 1854.

Int. 17. How was the business then conducted, by whom, and how did the brand or trade-mark read with such change in the firm?

Ans. 17. S. N. Pike continued the business in his own name, and the brand and trade mark was changed to S. N. Pike from S. N. & H. Pike. The style of the brand has never been changed since S. N. Pike continued the business in his own name, until Lawrence Myers was taken into the firm with him.

Int. 18. About when was Lawrence Myers taken in as a partner?

Ans. 18. About 1857 or 1858.

Int. 19. What was the firm-name and style from that time on?

Ans. 19. Samuel N. Pike & Co.

Int. 20. Up to what time was this firm-name continued?

Ans. 20. Until the withdrawal of Lawrence Myers in about 1861 or 1862; I can't give the exact date; he remained in five years.

Int. 21. What was the firm-name or style in which the business was carried on after Mr. Myers retired, and was the brand or trade-mark continued to be used by the succee ling firm?

82 Ans. 21. The business was conducted solely by S. N. Pike until Mr. Tilney and myself were taken in as partners in 1864. The brand was continued to be used the same ever since.

Int. 22. When you assumed the firm-name of S. N. Pike & Co. in the year 1864, did you and Mr. Tilney and Mr. Pike succeed to the right and interests of Samuel N. Pike in the trade-mark or brand in controversy, and was it so understood?

Ans. 22. We did. We could not have conducted our business as formerly without the right. It was so understood.

Int. 23. How did you, as a member of the firm of S. N. Pike & Co. in 1864, use, and how are you now, as a member of the firm of George W. Kidd & Co., as successors of S. N. Pike & Co., using said brand or trade mark?

Ans. 23. We then used it as we now are using it, branding it on barrels containing whiskey.

Int. 24. Was and is it branded on a particular kind of whiskey, or whiskey then and now made in a particular way?

Ans. 24. It has always been used and is now used in branding whiskey known to the trade as rectified whiskey.

And in answer to questions proposed to him by Ph. Chase, esq, counsel for Mills, Johnson, & Co., by way of cross examination, the witness testifies as follows:

X Int. 25. Were there written articles of copartnership between you and S. N. Pike and J. M. Tilney?

(Objected to as immaterial.)

Ans. 25. Yes.

X Int. 26. Where are they?

(Same objection.)

Ans. 26. I do not know. I asked for them, and am informed they are mislaid. We never had but one copy of themfiled in the safe. Between Mr. Pike and myself there was no written agreement.

83 X Int. 27. What was the date of the written agreement mentioned by you as mislaid or lost?

Ans. 27. About October, 1864.

X Int. 28. By whom was that agreement executed?

Ans. 28. By Samuel N. Pike, Joseph Tilney, and myself.

X Int. 29. Have you searched for the agreement, and, if so, when, and to what extent?

Ans. 29. I have, since this case begun, and have asked the executors for it; they told me they could not find it.

X Int. 30. Was the agreement executed in more than one part, and if so, to whom were the several parts delivered?

Ans. 30. I only remember signing one paper, and that was placed on file in the safe, subject to the use of the parties.

X Int. 31. Do you know who draughted the agreement?

Ans. 31. I do not.

X Int. 32. What capital did you and Mr. Tilney each put into the firm of S. N. Pike & Co. as organized October, 1864?

(Objected to as immaterial.)

Ans. 32. None—I wish to correct that answer, and say I don't remember; but subsequent, Mr. Tilney and myself owned the entire capital, with ninety-odd thousand dollars due us from S. N. Pike.

(All after the word "remember" objected to as irresponsive.)

X Int. 33. Was any settlement made between the members of the firm composed of S. N. Pike, yourself, and Mr. Tilney, and, if so, when?

Ans. 33. Yes, in 1869, at which time Mr. Pike owed our firm ninety-odd thousand dollars.

X Int. 34. How long was the firm of S. N. Pike & Co., as formed in 1864, to continue?

Ans. 34. Three years, with the privilege of five. At the expiration of the third year, Mr. Tilney withdrew, and a new firm was organ-

84 ized, composed of Samuel N. Pike and myself, which continued until January, 1872, when Mr. Bristow was taken in under the

same firm-name, which was used until the present firm of George W. Kidd & Co. was organized as their successors, December 7, 1872.

X Int. 35. What was the date of Mr. Pike's death?

Ans. 35. Dec. 7, 1872.

X Int. 36. When was the present firm of George W. Kidd organized?

Ans. 36. Our firm began from the time of Mr. Pike's death as successors. The style of the firm was not changed until May, 1873.

X Int. 37. Are there written articles of copartnership between the members of the present firm of George W. Kidd & Co.?

(Objected to as immaterial.)

Ans. 37. None executed.

X Int. 38. Have any ever been draughted?

Ans. 38. Yes.

X Int. 39. Where is that draught?

Ans. 39. It is in the office.

X Int. 40. Is this draught the basis of the copartnership agreement between the members of the firm of George W. Kidd & Co.?

(Objected to as incompetent and immaterial.)

Ans. 40. Not precisely.

X Int. 41. Is it in the main?

(Same objection.)

Ans. 41. Yes.

X Int. 42. Will you produce that agreement on this examination?

(Same objection.)

Ans. 42. I will.

X Int. 43. Then please do so.

(Witness sends for the paper.)

X Int. 44. When did you first become acquainted personally with the brand or trade-mark, "S. N. Pike, Magnolia Whiskey, Cincinnati, Ohio"?

Ans. 44. In 1854.

85 X Int. 45. How did you become acquainted with it?

Ans. 45. By being employed by Mr. Pike as clerk at Cincinnati, Ohio.

X Int. 46. How long were you employed by S. N. Pike as his clerk?

Ans. 46. About ten years—from 1854 till 1864.

X Int. 47. Where, during such ten years, did S. N. Pike carry on the business of manufacturing and selling whiskey under said brand or trade-mark?

Ans. 47. In Cincinnati, Ohio, at Nos. 18 and 20 Sycamore street.

X Int. 48. How long did S. N. Pike continue the manufacture and sale of the Magnolia brand of whiskey at 18 and 20 Sycamore street, Cincinnati, Ohio—up to what time?

Ans. 48. He and his associates made it until the sale of the property at 18 and 20 Sycamore street to Mills, Johnson & Co. in October, 1868.

X Int. 49. Have Mills, Johnson & Co., since the purchase of said property by them in October, 1868, carried on the same business theretofore carried on by S. N. Pike and S. N. Pike & Co.?

(Objected to as immaterial, indefinite, and not in cross-examination.)

Ans. 49. I am so informed.

X Int. 50. Have said Mills, Johnson & Co. manufactured and sold whiskey under said Magnolia brand and trade-mark ever since October, 1868?

(Same objections.)

Ans. 50. I believe they have.

X Int. 51. Have said Mills, Johnson & Co. manufactured and sold very large quantities of whiskey under said brand and trade-mark since October, 1868; and if yea, have you been constantly cognizant of their doing so?

(Same objection.)

Ans. 51. I believe they have, and am so informed, and am so cognizant.

X Int. 52. Did you not know, or were you not informed,
86 at or about the time of the purchase, that said Mills, Johnson & Co. purchased of S. N. Pike and S. N. Pike & Co. the property used and occupied in the whiskey business at 18 and 20 Sycamore street, together with the good-will of the business?

(Same objection.)

Ans. 52. I was informed that Mr. Pike sold his real estate to Mills, Johnson & Co. S. N. Pike & Co. never sold to Mills, Johnson & Co. the good-will of the business. I am not now aware of any good-will being sold to them.

X Int. 53. Did not all the property sold to Mills, Johnson & Co. belong individually to Samuel N. Pike?

(Same objections.)

Ans. 53. The real estate and works belonged to Mr. Pike, for the use of which we paid him rent. I don't know what Mr. Pike sold. I don't know what the transaction was between them.

X Int. 54. Did S. N. Pike or S. N. Pike & Co. ever carry on the business of manufacturing, putting up, or selling the Magnolia brand or trade-mark whiskey in Cincinnati or in the State of Ohio, after the sale to Mills, Johnson & Co.?

(Same objections.)

Ans. 54. We caused the brand to be put up and sold there to a limited extent at Cincinnati, Ohio.

X Int. 55. Was this done with Mr. Pike's knowledge?

(Same objections.)

Ans. 55. Yes, I think he did know.

X Int. 56. How much whiskey was put up in Cincinnati by S. N. Pike & Co. after October, 1868, under the Magnolia brand and trade-mark?

(Same objections.)

Ans. 56. I don't remember; not a large quantity. It was not to our interest; we did not find it profitable.

X Int. 57. Did not Mr. Pike object to any whiskey being put up by S. N. Pike & Co. under said brand and trade-mark after the sale to Mills, Johnson & Co.?

(Same objections.)

87 Ans. 57. He said that having sold his real estate to Mills, Johnson & Co., he thought we should not interfere in Cincinnati in the manufacture; and in courtesy to him I did not press it, nor did I waive my rights of doing business there, nor did he.

X Int. 58. Did the firm of S. N. Pike & Co. ever put up or sell any whiskey in Cincinnati or Ohio, or anywhere else except in New York, under said trade-mark and brand, after Mr. Pike told you you ought not to interefere with the business in Cincinnati?

(Same objections.)

Ans. 58. I am quite positive we did; I cannot swear positively.

X Int. 59. Who put it up, and when and how much, after being informed by Mr. Pike that you ought not to do so?

(Same objections, and as not correctly stating the witness's testimony.)

Ans. 59. I think Maddox, Hobert & Co.; I don't remember when nor the quantity.

X Int. 60. By whose particular order did Maddox, Hobert & Co. put up such whiskey?

(Same objections.)

Ans. 60. By S. N. Pike & Co.

X Int. 61. What member of the firm gave the order?

(Same objections.)

Ans. 61. Possibly myself.

X Int. 62. Are you sure you gave the order to Maddox, Hobert & Co. after Mr. Pike informed you he thought you should not interfere in the business at Cincinnati?

(Same objections.)

Ans. 62. I could not now swear to it.

X Int. 63. Where was the whiskey put up by Maddox, Hobert & Co. sent, and to whom?

(Same objections.)

Ans. 63. I don't remember; possibly New Orleans.

X Int. 64. Did Maddox, Hobert & Co. put up more than one lot?

(Same objections.)

88 Ans. 64. I think they did; I don't remember; I don't know.

And in answer to questions proposed to him by A. J. TODD, esq., counsel for George W. Kidd & Co., by way of redirect examination, witness testifies:

R. D. 65. When the firm, composed of Mr. Pike, yourself, and Mr. Bristow, was formed, what capital did you put in?

Ans. 65. I don't remember; about the same amount with Mr. Pike, within a few thousand dollars.

R. D. 66. When you went into the firm of S. N. Pike & Co., in the year 1864, where was the house then making and selling whiskey?

Ans. 66. Prior to that, in Cincinnati; subsequent, and from that date, both in Cincinnati and New York, making our principal house in New York.

R. D. 67. When did you first learn that Mills, Johnson & Co. had registered this trade-mark or brand?

Ans. 67. Upon making application for ourselves, within the past month or two.

R. D. 68. Do you know whether Mr. S. N. Pike claimed in his lifetime that the firm of S. N. Pike & Co. had a right to establish themselves anywhere, in business of making and selling such whiskey, if they chose to do so, and so claimed after Mills, Johnson & Co. had commenced business in the city of Cincinnati?

(Objected to as incompetent and immaterial.)

Ans. 68. He claimed that the sale of his real estate to Mills, Johnson & Co., and any other understanding he may have had with Mills, Johnson & Co., exclusive of the sale of his real estate, did not debar him nor our firm from the privileges before enjoyed—prior to the sale of that real estate—excepting the fee to the real estate; and so asserted in letters addressed to Mills, Johnson & Co., and at various times verbally.

(Answer objected to, as to the assertions of Pike and as to the contents of letters, as improper.)

R. D. 69. Did the firm of S. N. Pike & Co. ever seek to protect
89 this trade-mark or brand heretofore; and, if so, in what way did they proceed, and what steps did they take to secure or protect it?

Ans. 69. We filed copies and made the proper certificates to copyright it four or five years ago, probably six years; I don't remember exactly; I was under the impression that registering a copying of it at the Librarian's office in Washington was all that was necessary, until informed otherwise by Mr. Todd. We got the copyright four or five years ago.

(All of the answer in relation to copyright objected to as incompetent.)

We registered a fac-simile of this and other brands, including the "Dave Jones, Paris, Ky., Bourbon," and all the principal brands we use, in the county clerk's office.

(Same objection as above.)

(Draught of agreement referred to in answer to X 42 interrogatory was here produced for inspection of counsel for Mills, Johnson & Co.)

And in answer to further questions by way of cross-examination, the witness testified as follows:

X Int. 70. Can you state any part of the draught of copartnership agreement between you and Mr. Bristow, comprising the firm of George W. Kidd & Co., now shown you, which has not been acted upon as your partnership agreement?

Ans. 70. Nothing that I can remember.

X Int. 71. Was the capital you and Mr. Bristow each put into the firm of George W. Kidd & Co. the balances standing to your respective credits upon the books of S. N. Pike & Co.?

(Objected to as immaterial.)

Ans. 71. The books are not yet closed, and balances not ascertained.

X Int. 72. Whatever balances are when the books are closed and balances ascertained, are they the respective capital of yourself and Mr. Bristow?

(Same objection.)

Ans. 72. Not necessarily.

X Int. 73. What other capital, if any, do you respectively put in besides such balances?

90 Ans. 73. It is not determined; it depends upon our necessities.

X Int. 74. Have the surviving members of the firm of S. N. Pike & Co. ever made any settlement with the estate of S. N. Pike, or any division or distribution of the partnership assets of S. N. Pike & Co.?

(Objected to as immaterial.)

Ans. 74. Nothing definitely settled yet.

X Int. 75. Did you or Mr. Bristow, in the lifetime of Mr. Pike, or Mr. Pike himself, ever make objection to the use of said trade-mark and brand by Mills, Johnson & Co.; and, if so, upon what occasion and how?

Ans. 75. I did; I think Mr. Bristow did on several occasions verbally. Mr. Pike wrote to Mills, Johnson & Co. about it, asserting his rights in the premises.

Further cross-examination of this witness reserved until Monday, Oct. 27, 1873, at 11 a. m., at the same place.

OCTOBER 27, 1873—11 a. m.

Met pursuant to adjournment; parties present with counsel as before.

Examination of GEORGE W. KIDD resumed.

R. D. 76. In what name or style was this trade-mark registered and copyrighted?

(Objected to on the ground that the record is the best evidence.)

Ans. 76. It was registered by S. N. Pike & Co.; possibly both our names are used separately.

R. D. 77. When was it so registered?

(Same objection.)

Ans. 77. Early in 1869.

R. D. 78. Did you contribute your skill as well as your money to the conducting of the business of S. N. Pike & Co., which firm you say was formed in 1864, and also to its successors up to the present time?

Ans. 78. Yes.

By consent of counsel, the further cross-examination of this witness was reserved until Thursday, October 30, at 11 o'clock a. m., at the same place.

91 OCTOBER 30—11 a. m.

Met pursuant to adjournment; parties present with counsel as before.

Examination of GEORGE W. KIDD resumed.

R. D. 79. Is this a draught of the partnership agreement hereinbefore referred to, and which is now marked Exhibit C?

Ans. 79. Yes, it is.

Paper put in evidence marked Exhibit C, October 30, 1873. S. T. S., N. P.

GEORGE W. KIDD.

Adjourned to November 3, at 10 a. m., at same place.

NEW YORK, *November* 3, A. D. 1873—10 a. m.

Met pursuant to adjournment; counsel for respective parties present.

Further redirect examination of GEORGE W. KIDD by A. J. Todd, esq., counsel for George W. Kidd & Co.

(The redirect examination of the witness objected to by counsel for Mills, Johnson & Co., the examination having been closed.)

R. D. Int. 80. What did Mr. S. N. Pike and yourself sell to the new firm of S. N. Pike & Co. in January, 1872?

(Objected to as immaterial. The transactions between the members of the firm of S. N. Pike & Co. cannot affect the rights of Mills, Johnson & Co., done without their knowledge and consent; and further, that the witness has already been interrogated by his counsel upon direct examination in relation to the same matter.)

Ans. 80. In the item known and charged as distillery fittings Mr. Pike and myself, without itemizing any particular article or part of our works, included all the apparatus used in the working of our business, without making any exception, including stills, rectifiers, tubs, tanks, receivers, machines, pumps, engines, boilers, measures, plates, brands,

92 patterns or moulds of brands, dies, stamps, office furniture, safes, and other unmentioned articles for the sum of $15,000, the same having cost us between $40,000 and $50,000. We estimated them upon the basis of the value of condemned material.

R. D. Int. 81. Was it understood with Mr. S. N. Pike that the trademarks of these brands, including the one in controversy, were included in this sale to the new firm; and were or were they not treated as firm property?

(Objected to on the ground that the witness has already answered the question in his last answer, wherein he states what was included in

the item of distillery fittings, and that the same question has been previously answered by the witness.)

Ans. 81. They were so considered and included, but not itemized.

Cross-examination waived.

GEORGE W. KIDD.

STATE OF NEW YORK,
City and County of New York, ss:

At said city and county of New York, on the 3d day of November, A. D. 1873, before me personally appeared the above-named George W. Kidd, and made oath that the foregoing deposition by him subscribed contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co., at the time and place named in the notice hereto attached, to be used upon the hearing of an interference between the claims of the said George W. Kidd & Co. and those of Mills, Johnson & Co. before the Commissioner of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the original notice hereto annexed, and attended, by Philo Chase, esq., their counsel.

[L. S.]

SAM. TRO. SMITH,
Notary Public, New York County.

93

Before the Commissioner of Patents.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "Dave Jones, Paris, Ky., Bourbon," and application of George W. Kidd & Co. for registration of same.

SIRS: Please take notice that on Wednesday, October 22, 1873, at the office of A. J. Todd, esq., 37 Park Row, New York City, at eleven o'clock in the forenoon, we shall proceed to take the testimony of Isaac Bristow, of Brooklyn, N. Y., G. W. Kidd, of New York City, and others, as witnesses in our behalf.

The examination will continue from day to day until completed.

You are invited to attend and cross-examine.

GEO. W. KIDD and
ISAAC BRISTOW,
Firm of Geo. W. Kidd & Co.
By MUNN & Co.,
Attorneys.

To Messrs. MILLS, JOHNSON & CO.,
18 *and* 20 *Sycamore street, Cincinnati, Ohio.*

Dated New York, October 15, 1873.

STATE OF OHIO,
Hamilton County, ss:

94 Leonidas H. Swormstedt makes oath and says that he served Mills, Johnson & Co. by leaving a copy of within notice with William M. Ramsay personally, one of the law firm of Matthews, Ramsay & Matthews, attorneys of record at Cincinnati, Ohio, and the attorneys of said Mills, Johnson & Co., on this 18th day of October, 1873, at half past twelve o'clock p. m.

L. H. SWORMSTEDT.

Sworn to and subscribed before me this 18th day of October, 1873.

[L. S.]

CHARLES BIRD,
Notary Public, Hamilton County, Ohio.

Before the Commissioner of Patents.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "Dave Jones, Paris, Ky., Bourbon," and application of George W. Kidd & Co. for registration of same.

Depositions of witnesses examined on behalf of George W. Kidd & Co., pursuant to the annexed notice, at the office of A. J. Todd, esq., No. 37 Park Row, in the city of New York, on Wednesday, the 22d day of October, A. D. 1873, at eleven o'clock a. m.

A. J. Todd, esq., present, as counsel for applicants. George W. Kidd & Co., and Mills, Johnson & Co., present, by Ph. Chase, esq., their counsel.

Adjourned to Thursday, October 23, at eleven o'clock a. m., at the same place.

THURSDAY, *October* 23, 1873.

Met pursuant to adjournment; parties present as before.
Adjourned to Oct. 27, at 11 o'clock a. m., at same place.

95 OCTOBER 27.

Met pursuant to adjournment; parties present as before.

GEORGE W. KIDD being produced and duly sworn as a witness on the part of the applicants, George W. Kidd & Company, in answer to questions proposed by A. J. Todd, esq., counsel for said applicants, testifies as follows:

Int. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is George W. Kidd. I am thirty-eight years of age. Reside in New York; am a distiller and rectifier.

Int. 2. Are you a member of the firm of George W. Kidd & Co., which firm has applied for registration for trade-mark now in controversy?

Ans. 2. I am.

Int. 3. When was this trade-mark in question first adopted, and by whom?

Ans. 3. About the year 1858 or 1859, by S. N. Pike & Co.

Int. 4. Who composed the firm of S. N. Pike & Co. at the time of the adoption of such trade-mark?

Ans. 4. S. N. Pike, Lawrence Myers, and Phillip Pike.

Int. 5. Were you ever a member of the firm of S. N. Pike & Co? If so, when and in what year did you become a partner, and state all the partners of that firm at that time?

Ans. 5. Yes; since October, 1864, when S. N. Pike, Joseph Tilney, and myself composed the firm.

Int. 6. What changes had there been in the firm prior to this, and from the time when the trade-mark in question was first adopted?

Ans. 6. Myers and Phillip Pike came into the firm about 1858 and remained five years, withdrawing in 1863. From that time S. N. Pike was alone, until Mr. Tilney and myself went into the firm in 1864.

Int. 7. State what changes, if any, there have been in the firm down to the present time?

96 Ans. 7. The partnership of Pike, Tilney & Kidd lasted three years, Mr. Tilney withdrawing in 1867, Pike and myself continuing it under the same firm-name until January, 1872, when Mr. Bristow

was taken into the firm. Mr. Pike died Dec. 7, 1872, Mr. Bristow and myself continuing the business until the present time.

Int. 8. When did the firm of S. N. Pike & Co., of which you became a member in 1864, first adopt this trade-mark in question?

Ans. 8. We adopted it at once in both houses in New York and Cincinnati; more extensively in New York.

Int. 9. Did such firm of S. N. Pike & Co. and its successors, down to the present time, continue to use the trade-mark in question? And are you now—that is, the firm of George W. Kidd & Co., as successors of S. N. Pike & Co.—using the trade-mark in question?

Ans. 9. They did, and we are using it.

Int. 10. How has such trade-mark been used by all these various firms since its original adoption, as testified to by you, including your own firm, as the successor of the firm of S. N. Pike & Co.?

Ans. 10. It was an iron brand burned on the head of a barrel.

Int. 11. Who originated this brand in question, "Dave Jones, Paris, Ky., Bourbon"?

Ans. 11. I draughted it and many other brands and trade-marks when I was in the employ of S. N. Pike & Co.

Int. 12. Was there any understanding or agreement with S. N. Pike to effect that yourself and Mr. Tilney, and subsequently yourself and Mr. Bristow, were to have simply an interest in the profits of the business of S. N. Pike?

Ans. 12. None whatever.

Int. 13. Was there ever any money value set on this trade-mark or brand in question by S. N. Pike in his lifetime?

Ans. 13. No.

Int. 14. Who is the executor or administrator of the estate of S. N. Pike, deceased?

Ans. 14. Joseph Tilney, Samuel Craighead, W. R. Williamson, and Emanuel Miller.

97 Int. 15. When you assumed the firm-name of S. N. Pike & Co., in the year 1864, did you and Mr. Tilney and Mr. Pike succeed to the right and interest of Samuel N. Pike in the trade-mark or brand in controversy, and was it so understood?

(Objected to as assuming a legal conclusion and facts not proved.)

Ans. 15. We did; we so understood.

Int. 16. Was it branded on a particular kind of whiskey, or whiskey then and now made in a particular way?

Ans. 16. It was branded on a particular kind of whiskey made then and now in a particular way.

Int. 17. Did you put in capital, as well as to give your skill to the business, when the firm of S. N. Pike & Co. was formed in the year 1864?

Ans. 17. Yes, upon jogging my memory. I think I had about ten thousand dollars, and I think Mr. Tilney had about fifty thousand dollars; probably fifteen thousand would be about what I put in.

Int. 18. When the firm composed of Mr. Pike, yourself, and Mr. Bristow was formed did you put in capital, as well as contribute your skill to the business? If so, about what amount, if you recollect?

Ans. 18. I did, about the same amount as Mr. Pike put in, lacking about three thousand dollars.

Int. 19. When the firm of S. N. Pike & Co. was formed, in the year 1864, where was the house then making and selling whiskey?

Ans. 19. In Cincinnati, and subsequently in New York and Cincinnati.

Int. 20. When did such firm of S. N. Pike & Co. make, manufacture, and sell whiskey in New York and Cincinnati at the same time; that is, how early, having reference to the formation of such firm in the year 1864?

Ans. 20. We made and sold it immediately in both places; made and sold it principally in New York; the Dave Jones brand

98 Int. 21. When did you first learn that Mills, Johnson & Co. had registered this trade-mark or brand in controversy?

Ans. 21. Very recently, through Munn & Co. Within the last month probably; certainly inside of sixty days.

Int. 22. Did the firm of S. N. Pike & Co., of which you are the successors, ever seek to protect this trade-mark or brand heretofore; and, if so, in what way did they proceed, and what steps did they take to secure or protect it?

(Objected to on the ground that certified copies are the best evidence.)

Ans. 22. Yes; we registered or copyrighted it in the clerk's office, February 24, 1869, and subsequently in the librarian's office in Washington.

(Same objection to answer as to question.)

Int. 23. In what name was it so copyrighted?

Ans. 23. Samuel N. Pike & Co.

Int. 24. Was this done with Mr. S. N. Pike's knowledge?

(Objected to on the ground that Mills, Johnson & Co. are not affected by Mr. Pike's acts without their knowledge and consent.)

Ans. 24. It was.

Int. 25. Has there been, since the decease of Mr. S. N. Pike, an inventory made to your firm of the distillery fittings and other property connected therewith?

Ans. 25. Yes.

Int. 26. Is the brand of the trade-mark in controversy included in the distillery fittings?

(Objected to as immaterial, and that the inventory is the best evidence.)

Ans. 26. Yes.

Int. 27. Who paid for this brand when it was first made?

(Objected to as immaterial and irrelevant.)

Ans. 27. The firm of S. N. Pike & Co.

And in answer to questions proposed to him by Ph. Chase, esq., counsel for Mills, Johnson & Co., by way of cross-examination, the witness testified as follows:

X Int. 28. What brand do you have reference to in your last answer?

99 Ans. 28. The brand "Dave Jones, Paris, Ky., Bourbon."

X Int. 29. What was the nature of the brand?

Ans. 29. Cast iron or copper from a pattern-mould.

X Int. 30. Where was it made, by whom, and when?

Ans. 30. I first draughted it in Cincinnati, but don't remember who cast it or who made the mould. It was first cast in Cincinnati in about 1858.

X Int. 31. Was it paid for by S. N. Pike & Co. about that time?

Ans. 31. I believe it was.

X Int. 32. How much was paid for it?

Ans. 32. I don't remember; probably not exceeding ten dollars.

X Int. 33. Had you then an interest in the firm of S. N. Pike & Co.?

(Objected to as immaterial.)

Ans. 33. I had not.

X Int. 34. How do you know S. N. Pike & Co. paid for this iron brand?

Ans. 34. Because I am certain they paid for everything they contracted for.

X Int. 35. Have you any other knowledge of such payment?

Ans. 35. No other knowledge.

X Int. 36. When was the inventory made of the distillery and other property of S. N. Pike & Co.?

Ans. 36. In January, 1872, when Mr. Bristow was taken in as a partner.

X Int. 37. Where is that inventory now?

Ans. 37. I don't know.

X Int. 38. Who made it?

Ans. 38. Mr. Pike, Mr. Bristow, and myself.

X Int. 39. What was done with it?

Ans. 39. I don't know; possibly we have got it yet.

X Int. 40. Was it not put into the safe with the other company papers?

Ans. 40. I don't know; we have three safes; it may possibly be there yet.

100 X Int. 41. When did you last see it?

Ans. 41. In January, 1872.

X Int. 42. Will you search for the paper and produce it on this examination?

Ans. 42. Yes.

X Int. 43. Do you mean that as surviving partners of S. N. Pike & Co. you and Mr. Bristow have made an inventory of the assets of the firm of S. N. Pike & Co.?

(Objected to as indefinite and already answered.)

Ans. 43. We have made one, but it is incomplete.

X Int. 44. When did you make it?

Ans. 44. Immediately after Mr. Pike's death.

X Int. 45. Where is it?

Ans. 45. In the hands of the executors.

X Int. 46. Have you a copy or duplicate?

Ans. 46. I think not.

X Int. 47. Are you sure?

Ans. 47. No.

X Int. 48. Will you produce it?

Ans. 48. Yes; if we have got it.

X Int. 49. Do you mean to say the Dave Jones trade-mark was adopted by S. N. Pike & Co., at Cincinnati, in 1858 or 1859?

Ans. 49. I do.

X Int. 50. Was that mark constantly used by S. N. Pike & Co., at Cincinnati, until they sold out their Cincinnati business to Mills, Johnson & Co.?

(Objected to as assuming what is not yet proved—that is, that part of the question that refers to selling out the Cincinnati business to Mills, Johnson & Co., and, further, as the witness has not so stated, and as not in cross-examination.)

Ans. 50. It was used; we did not sell our business to Mills, Johnson & Co.

X Int. 51. Do you mean that the "Dave Jones" mark was constantly used in Cincinnati by S. N. Pike & Co. until Mills, Johnson & Co. commenced business there?

(Objected to for the same reason as above stated.)

101 Ans. 51. I cannot say that it was constantly used. The brand being new and not known, we had but a limited trade for it; it had no established reputation until built up by the New York house.

X Int. 52. Have not Mills, Johnson & Co. used said Dave Jones trade-mark ever since the commencement of their business in Cincinnati?

(Objected to as not in cross-examination and as immaterial.)

Ans. 52. I don't know; I cannot speak for anybody else.

X Int. 53. Have you not been so informed and do you not so believe?

(Same objections and as calling for hearsay.)

Ans. 53. Yes.

X Int. 54. Did not said Dave Jones wiskey get its reputation started in Boston from the Cincinnati House?

Ans. 54. No.

X Int. 55. Have you any personal knowledge of the changes of the firm of S. N. Pike & Co. in 1858?

Ans. 55. Yes; about that time Mr. Myers and Phillip Pike were taken into the firm for a term of five years.

X Int. 56. What do you consider the Dave Jones trade-mark worth?

(Objected to as immaterial.)

Ans. 56. I could not estimate its value.

X Int. 57. Can you approximate its value?

(Same objection.)

Ans. 57. No; I could not

X Int. 58. Have you any idea of its value?

(Same objection.)

Ans. 58. No.

X Int. 59. Have you ever known any value to be placed upon it by anybody?

(Same objection.)

Ans. 59. Yes; it was included with other brands with our stock taken in January, 1872; but no particular value placed upon any of them, on any particular one.

102 (All that part of the answer referring to the inventory objected to as irresponsive.)

X Int. 60. In what office, and when, was it attempted to copyright this brand?

Ans. 60. In our present office in 1869; we did copyright it in the clerk's—I call it the county clerk's office. It may be some other clerk.

X Int. 61. What county clerk's office?

Ans. 61. I believe the county of New York.

X Int. 62. When?

Ans. 62. February 24, 1869.

X Int. 63. Who prepared the papers.

Ans. 63. I don't remember.

X Int. 64. Who took the papers to the clerk's office?

Ans. 64. I don't remember.

X Int. 65. Who paid for it?

Ans. 65. If there was anything paid for it—which I don't remember—S. N. Pike & Co. I don't remember who personally; possibly the cashier.

X Int. 66. Was there more than one brand included in said copyright; if so, what brands?

Ans. 66. No other brands on that date to my recollection; but about

a week later the Magnolia and other brands, about a dozen or over; from twelve to twenty brands.

Adjourned to October 27, at 10 a. m., at same place.

OCTOBER 27—10 a. m.

Met pursuant to adjournment. Parties present with counsel as before.

Examination of GEORGE W. KIDD resumed by A. J. Todd, esq., counsel for George W. Kidd & Co.; counsel for Mills, Johnson & Co. not making any cross-examination.

R. D. 67. Has the firm of George W. Kidd & Co. got the pattern-mould for the brand and trade-mark, "Dave Jones, Paris, Ky., Bourbon"?

Ans. 67. We have.

103 R. D. 68. Having reference to your answer to the cross 49th interrogatory, are you positive that there was a company or firm in existence at the time of the first adoption of this trade-mark and brand, irrespective of the particular year or time when such firm was formed?

Ans. 68. Yes.

R. D. 69. At the time that the firm of Mills, Johnson & Co. was formed in Cincinnati, was this trade-mark and brand being used by the firm of S. N. Pike & Co. in both New York and Cincinnati?

Ans. 69. It was.

And in answer to further questions proposed to him by Ph. Chase, esq., counsel for Mills, Johnson & Co., by way of recross-examination, the witness testified as follows:

X Int. 70. Do you know what the 68th redirect question means?

Ans. 70. The 68th redirect question being read to the witness, he answers: Yes.

X Int. 71. What does it mean?

(Objected to, as the question shows for itself.)

Ans. 71. It means—his own question.

X Int. 72. Can you answer any more definitely than this?

Ans. 72. No.

By consent of counsel, the further cross-examination of this witness is adjourned till Thursday, October 30, at 11 o'clock a. m., at the same place.

OCTOBER 30, 1873—11 o'clock a. m.

Met pursuant to adjournment; parties present as before, and, being engaged in the examination of other witnesses, adjourned, by consent of parties, to November 3, at 10 o'clock a. m., at same place.

NEW YORK, *Nov.* 3, 1873—10 a. m.

Met pursuant to adjournment; counsel for respective parties present.

104 Counsel for applicants says that the witness George W. Kidd is present for cross-examination respecting the inventory called for in cross 48 interrogatory, the book containing which was present here under the custody of Mr. Tilney, who was improperly examined respecting the same after his cross-examination had been closed, and after it was understood that the book was to be produced and the present witness, Mr. Kidd, examined respecting the inventory contained

therein; hence, under the circumstances, the cross examination of Mr. Tilney was objected to as irregular.

Examination of the witness GEORGE W. KIDD resumed by A. J. Todd, esq., counsel for George W. Kidd & Co.

The redirect examination of the witness objected to by counsel for Mills, Johnson & Co., the examination having been closed.

R. D. 73. What did Mr. S. N. Pike and yourself sell to the new firm of S. N. Pike & Co. in January, 1872?

(Objected to as immaterial. The transactions between the members of the firm of S. N. Pike & Co. cannot affect the rights of Mills, Johnson & Co., done without their knowledge and consent; and, further, that the witness has already been interrogated by his counsel upon direct examination in relation to the same matter.)

Ans. 73. In the item known and charged as distillery fittings, Mr. Pike and myself, without itemizing any particular article or part of our works, included all the apparatus used in the working of our business, without making any exception; including stills, rectifiers, tubs, tanks, receivers, machines, pumps, engines, boilers, measures, plates, brands, patterns or moulds of brands, dies and stamps, office furniture, safes, and other unmentioned articles, for the sum of $15,000; the same having cost us between $40,000 and $50,000. We estimated them upon the basis of the value of condemned material.

105 R. D. Int. 74. Was it understood with Mr. S. N. Pike that the trade marks of these brands, including the one in controversy, were included in this sale to the new firm, and were or were they not treated as firm property?

(Objected to on the ground that the witness has already answered the question in his last answer, wherein he states what was included in the item of distillery fittings, and that the same question has been previously answered by the witness.)

Ans. 74. They were so considered and included, but not itemized.

Cross-examination waived.

GEORGE W. KIDD.

Examination adjourned for the purpose of introducing a certified copy of a paper, to November 4, 1873, at 11 a. m., at same place by consent.

NOVEMBER 4, 1873.

Met pursuant to adjournment; counsel for parties present.

Counsel for George W. Kidd & Co. offer in evidence a certified copy from the Librarian of Congress of the original record of copyright of the brand, "Dave Jones, Paris, Ky., Bourbon."

Counsel for Mills, Johnson & Co. object to the evidence as improper, and not competent evidence against Mills, Johnson & Co.

Paper put in evidence marked Exhibit E, November 4, 1873. S. T. S., N. P.

STATE OF NEW YORK,
City and County of New York, ss:

At the said city and county of New York, on the 3d day of November, A. D. 1873, before me, personally appeared the above-named George W. Kidd, and made oath that the foregoing deposition by him sub-
106 scribed contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co., at the time and place named in the notice hereto attached

to be used upon the hearing of an interference between the claims of the said George W. Kidd & Co. and those of Mills, Johnson & Co., before the Commissioner of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the original notice hereto annexed, and attended by Philo Chase, esq., their counsel.

SAM. TRO. SMITH,
Notary Public, New York County.

107 Before the Commissioner of Patents.

In the matter of the interference between the registered trade mark of Mills, Johnson & Co., consisting of "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," and application of Geo. W. Kidd & Co.

Also,

In the matter of the interference between the registered trade mark of Mills, Johnson & Co., consisting of "Dave Jones, Paris, Ky., Bourbon," and application of Geo. W. Kidd & Co., for registration of same.

Depositions of witnesses examined on behalf of George W. Kidd & Co. pursuant to the annexed notices, at the office of A. J. Todd, esq., at No 37 Park Row, in the city of New York, on Wednesday, the 22d day of October, A. D. 1873, at eleven o'clock a. m.

A. J. Todd, esq., present as counsel for George W. Kidd & Co., and Mills, Johnson & Co., present, with Ph. Chase, esq., their counsel.

Adjourned to October 23, 11 a. m., at same place.

THURSDAY, *October* 23, 1873.

Met pursuant to adjournment; parties present as before.

JOSEPH TILNEY, being produced and duly sworn as a witness
108 in behalf of George W. Kidd & Co., in answer to questions proposed to him by A. J. Todd, esq., counsel for said George W. Kidd & Co., testifies as follows:

Int. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is Joseph Tilney; age, fifty-three years; reside in Brooklyn, N. Y.; am retired from business.

Int. 2. Were you ever associated in business with S. N. Pike, now deceased, and George W. Kidd? If so, when and in what business, and what was your firm name and style?

Ans. 2. Yes; we were associated in the rectifying and distilling business, commencing October 15, 1864, and ending, as far as I was concerned, October 15, 1867, under the style of S. N. Pike & Co., in Cincinnati, Ohio, and in the city of New York.

Int. 3. At the time that you associated yourself in business with Mr. S. N. Pike and George W. Kidd as the firm of S. N. Pike & Co., in the year 1864, as you testify, what interest in Mr. Pike's business brands and trade marks did you receive?

Ans. 3. Mr. Pike furnished the principal capital of the concern, with the brands and everything else that was in use in the distillery at the time; Mr. Kidd and myself contributing some capital also.

Int. 4. Was there any understanding or agreement with S. N. Pike to effect that yourself and Mr. Kidd were to have simply an interest in the profits of the business of S. N. Pike?

(Objected to as immaterial.)

Ans. 4. No.

Int. 5. Was there ever any money value set on the trade marks or brands in controversy by S. N. Pike in his life-time during the existence of the firm of which you were a member?

(Same objection.)

Ans. 5. No.

109 Int. 6. Were these trade marks, "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," and "Dave Jones, Paris, Ky., Bourbon," used in connection with whiskey manufactured by S. N. Pike & Co., both in the cities of Cincinnati and New York?

Ans. 6. Yes.

Int. 7. State whether they were an essential part of the business or not.

Ans. 7. Yes; they were a valuable part of the business.

Int. 8. State how long the trade mark, "Dave Jones, Paris, Ky., Bourbon," had been adopted and in use at the time that said firm of S. N. Pike & Co. was formed.

Ans. 8. I cannot say with exactness; perhaps a year or more.

Int. 9. State whether these brands were used in connection with whiskey of a peculiar kind or made in a peculiar way; and state whether such kinds of whiskey were known by these brands.

Ans. 9. Yes, they were, to both branches of the question.

Int. 10. Where was the largest portion of the "Dave Jones" brand of whiskey introduced; that is, in which city manufactured and sold?

Ans. 10. The principal part in New York.

And in answer to questions proposed to him by PH. CHASE, esq., counsel for the said Mills, Johnson & Co., by way of cross-examination, the witness testified as follows:

X Int. 11. Are you one of the executors of said S. N. Pike?

Ans. 11. Yes.

X Int. 12. You were not a partner with Mr. Pike at the time of his decease?

Ans. 12. No.

X Int. 13. Was a settlement made of the partnership affairs of S. N. Pike & Co., composed of yourself, Mr. Pike, and Mr. Kidd?

(Objected to as immaterial.)

Ans. 13. Yes, principally so, but not completely settled yet; I
110 might say that Mr. Kidd and myself are interested in property in connection with Mr. Pike's estate, said property having been purchased with the partnership funds.

X Int. 14. Were any of the partnership funds ever used in purchasing either of said trade marks?

(Objected to as immaterial.)

Ans. 14. No.

X Int. 15. Did you or Mr. Kidd, to your knoweldge, ever pay to Mr. Pike anything for said trade marks, or either of them?

(Objected to as immaterial.)

Ans. 15. No.

X Int. 16. Did Mr. Pike convey to you or to Mr. Kidd, so far as you know, any interest in said trade marks, or either of them?

(Same objection.)

Ans. 16. Do you mean by any legal instrument?

Counsel says, "By any conveyance."

Witness says: I can't answer that definitely this moment; I'll tell

you why I cannot. They might or might not have been mentioned in our articles of copartnership; but I have not a copy of that copartnership agreement, and do not now remember.

X Int. 17. When did you last know of the existence of your copartnership agreement?

Ans. 17. It is some years since I saw it, but I believe it is now in the possession of Mr. Williamson, at Cincinnati.

X Int. 18. Is Mr. Williamson one of your co-executors of Mr. Pike?

Ans. 18. Yes.

X Int. 19. Does said copartnership agreement contain whatever stipulations there ever were for the conveyance of said trade marks to the firm of S. N. Pike & Co.?

(Objected to as immaterial.)

Ans. 19. Yes, if there were any.

X Int. 20. Has any inventory or schedule of the assets of the late firm of S. N. Pike & Co., as composed of Mr. Pike, Mr. Kidd, and Mr. Bristow, ever been made?

(Same objection.)

111 Ans. 20. No.

X Int. 21. Did you, as a member of the firm of S. N. Pike & Co., or individually, ever claim any title in either of said trade-marks?

(Same objection, and as indefinite.)

Ans. 21. No; the question was never mooted when I was in the firm.

X Int. 22. Did you ever hear Mr. Kidd make any claim of title in either of said trade-marks during the time you were a copartner with him in the firm of S. N. Pike & Co.?

(Same objection.)

Ans. 22. No; not for himself personally.

X Int. 23. What was your position in the firm of S. N. Pike & Co.?

Ans. 23. I was the second person in the firm, and had principally charge of financial matters, and also of the correspondence.

X Int. 24. Did you have the principal charge and management of the office business?

Ans. 24. Yes.

X Int. 25. When did you first become connected in business with Mr. S. N. Pike, and at what place, and how long did you continue connected with him and in what relation?

Ans. 25. I first became connected with him in business in 1848 as book-keeper in Cincinnati, Ohio. I continued in that relation until February, 1864; after that as partner with him in the grocery business until October, 1864, when we went into the business of S. N. Pike & Co. During all this time we were in the business of rectifying and distilling whiskey, with the exception of that short term from February to October, 1864, when we were in the grocery business. Duing that time, about the year 1852 or 1853, I was away from him about a year in Indiana.

X Int. 26. When did you first become acquainted with the "Magnolia" and "Dave Jones" brands?

Ans. 26. I think Mr. Pike used the "Magnolia" brand about the year 1849. The "Dave Jones" brand I am not so sure about; probably in 1862 or 1863.

112 X Int. 27. Was the "Dave Jones" brand or trade-mark first used and adopted by Mr. Pike at the Cincinnati house?

(Objected to as immaterial.)

Ans. 27. Yes.

X Int. 28. How long was the "Dave Jones" brand exclusively used

by the Cincinnati house before its use elsewhere prior to your partnership of S. N. Pike & Co.?

(Same objection.)

Ans. 28. I should say for a year or two; can't say exactly.

X Int. 29. During this year or two, was Mr. Pike alone in the whiskey business?

(Same objection.)

Ans. 29. Yes.

X Int. 30. For how long a time prior to the formation of your firm of S. N. Pike & Co. in 1864 was Mr. Pike alone in the whiskey business?

(Same objection.)

Ans. 30. I think from May, 1863, to October, 1864.

X Int. 31. During that time, was Mr. Pike making use of the "Magnolia" and "Dave Jones" brands?

(Same objection.)

Ans. 31. Yes.

X Int. 32. When did Mr. Johnson, of the firm of Mills, Johnson & Co., become connected with Mr. Pike in the whiskey business?

(Same objection.)

Ans. 32. I don't know. I can't remember.

X Int. 33. Was the "Dave Jones" brand in use by Mr. Pike at the time Mr. Johnson first went into the employ of Mr. Pike?

(Same objection.)

Ans. 33. I can't say. I don't remember.

X Int. 34. How long was the "Dave Jones" brand in use at the Cincinnati house before its use by the New York house?

(Objected to as already answered.)

113 Ans. 34. About a year or two.

X Int. 35. Were you connected with Mr. Pike at the time of the sale of the Cincinnati house to Mills, Johnson & Co.?

(Objected to as not in cross-examination, and as immaterial.)

Ans. 35. No; I retired from the firm in 1867.

X Int. 36. From the time of the purchase of the Cincinnati house and property of Mr. Pike by Mills, Johnson & Co., have not they, Mills, Johnson & Co., continued to use both of said brands and trade-marks?

(Objected to as not competent in any sense, and as not cross examination, and as it does not appear that the witness has any knowledge on the subject, and immaterial.)

Ans. 36. I have been so informed.

X Int. 37. Were you so informed, and have you been so cognizant of the fact ever since said purchase in 1868?

(Same objection.)

Ans. 37. Yes.

X Int. 38. Did said firm of S. N. Pike & Co. attempt to put up whiskey under either of said brands or trade-marks, except in the city of New York, after Mr. Pike's sale to Mills, Johnson & Co. in 1868?

(Objected to as based on hearsay, not in cross-examination, and immaterial.)

(Question withdrawn.)

X Int. 39. Do you have a general knowledge of the value of the property sold by Pike to Mills, Johnson & Co.?

(Objected to as immaterial.)

Ans. 39. Yes.

X Int. 40. Was not the good-will of the business a valuable and essential part of the property sold by Pike to Mills, Johnson & Co.?

(Same objection.)

Ans. 40. I suppose it was.

114 X Int. 41. When you retired from the firm of S. N. Pike & Co., did you receive, or claim to receive, anything on account of either of said trade-marks?

(Objected to as immaterial.)

Ans. 41. No.

And in answer to questions proposed to him by A. J. TODD, esq., by way of further direct examination, the witness testified as follows:

R. D. 42. Was not the Magnolia brand first adopted when the firm consisted of S. N. & H. Pike?

Ans. 42. Yes.

R. D. 43. Was not the Dave Jones brand and trade-mark first adopted when Lawrence Myers was in the firm, which firm-style was then S. N. Pike & Co.?

Ans. 43. It might have been.

R. D. 44. Did either Henry Pike or Lawrence Myers receive a compensation from their firms, when they retired respectively from such firms, for such brands or trade-marks in controversy?

Ans. 44. No; not to my knowledge.

R. D. 45. If they had, would you or not have been likely to have known of it?

Ans. 45. Yes.

R. D. 46. From what time until what time was Lawrence Myers connected in such business with S. N. Pike?

Ans. 46. I think from the year 1858 to the year 1863.

R. D. 47. What was the name and style of the firm at the time Mr. Johnson first went into its employ?

Ans. 47. S. N. Pike & Co., at the time Lawrence Myers was in the company.

And in answer to further questions proposed to him by Ph. Chase, esq., by way of cross-examination, the witness testified as follows:

X Int. 48. Was Lawrence Myers a silent partner in the firm?

Ans. 48. Yes; he took no active management of the company.

115 In 1858, S. N. Pike associated with himself his brother Philip Pike, of N. Y., Phillip Pike representing himself and Lawrence Myers, but neither of them taking any active part in the management of the business. Phillip Pike subsequently died, Lawrence Myers still remaining, and the style of the firm was not changed.

J. TILNEY.

Adjourned by consent of parties to Monday, Oct. 27, at 10 o'clock a. m., at the same place.

STATE OF NEW YORK,
City and County of New York, ss:

At said city and county of New York, on the 23d day of October, A. D. 1873, before me personally appeared the above-named Joseph Tilney, and made oath that the foregoing deposition, by him subscribed, contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co., at the time and place named in the notice hereto attached, to be used upon the hearing of an interference between the claims of the said George W. Kidd & Co. and Mills, Johnson & Co., before the Commissioner of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the

original notice hereto annexed, and attended by Philo Chase, esq, their counsel.

[L. S.] SAM. TRO. SMITH,
Notary Public, New York County.

OCTOBER 27, 1873—10 *a. m.*

Met pursuant to adjournment. Parties present with counsel as before.

JOSEPH TILNEY, being recalled, testifies as follows:

Int. 1. In your former deposition you were asked, in cross 27th interrogatory, as follows: "Was the 'Dave Jones' brand or trade-mark
116 first used or adopted by Mr. Pike at the Cincinnati house?" and you replied, "Yes." Had you reference to the fact of Mr. Pike adopting such trade-mark while he was alone in business, or while he was a member of a firm doing business in Cincinnati? And, if the latter, what was the style of such firm?

Ans. 1. I give my testimony entirely from memory; but I think it probable Mr. Pike was a member of the firm of S. N. Pike & Co., said firm being composed at the time of Samuel N. Pike and Phillip Pike, with Lawrence Myers as silent partner.

And in answer to questions proposed to witness by Ph. Chase, esq., counsel for Mills, Johnson & Co., by way of cross-examination, he testifies as follows:

X Int. 2. Do you state this with any degree of certainty, or is it merely an impression?

Ans. 2. I feel pretty well satisfied that I am correct in this statement. If I had the books I could tell you.

X Int. 3. When did Lawrence Myers become a silent partner in the firm?

Ans. 3. I think it was in the year 1858.

X Int. 4. When did Lawrence Myers cease to be a member of the firm?

Ans. 4. In the year 1863—May 1, 1863.

X Int. 5. When did Phillip Pike cease to be a member of the firm?

Ans. 5. I can't give you the exact date he died; I think Mr. Pike bought Mr. Phillip Pike out some time before his death; can't tell how long, whether two or three years after the formation of the firm; the firm-name continued the same after S. N. Pike bought Phillip Pike out, and Mr. S. N. Pike settled with Mr. Myers on the expiration of the partnership, and took the assets of the firm.

X Int. 6. Who wrote the partnership agreement of the firm of S. N. Pike & Co., composed of Pike, Tilney and Kidd?

Ans. 6. I did.

117 X Int. 7. Did that partnership agreement contain any reference to the Magnolia and Dave Jones trade marks or brands?

(Objected to as immaterial.)

Ans. 7. I do not remember.

X Int. 8. At the formation of this partnership, was any inventory made of the assets or property which S. N. Pike put into the business?

(Same objection.)

Ans. 8. Yes; an inventory of the stock on hand was made at the time, October, 1864; I mean the property that S. N. Pike put into the concern.

X Int. 9. Do you know where that inventory is?

Ans. 9. I believe Mr. Williamson has the possession of it.

X Int. 10. Were the Magnolia and Dave Jones trade-marks included in that inventory?

(Same objection.)

Ans. 10. I think not.

X Int. 11. Did Mr. Pike put into the firm any property except what is mentioned in the inventory?

(Same objection.)

Ans. 11. No; I think not.

X Int. 12. What did you and Mr. Kidd put into the concern, as your respective shares, against the property included in the inventory put in by Mr. Pike?

Ans. 12. I think my capital was about $50,000; Mr. Kidd's I do not remember—a much smaller amount than that.

X Int. 13. Did not the Dave Jones brand first get its popularity from the Cincinnati house?

(Objected to as indefinite and immaterial.)

Ans. 13. Of course it was first manufactured in Cincinnati; but the New York house dealt in it most largely. The trade in it in Cincinnati was comparatively small as compared with the trade in it in New York.

X Int. 14. Was not the Boston trade started from the Cincinnati house?

(Objected to as immaterial.)

Ans. 14. Yes; I think so.

118 X Int. 15. When was the Boston trade for the Dave Jones brand started?

(Same objection.)

Ans. 15. I cannot tell.

X Int. 16. Has not the Boston demand for the Dave Jones brand been larger than that of any other place?

(Same objection.)

Ans. 16. I think so.

X Int. 17. Did not George Simmons, Mr. Pike's salesman, start the Boston trade for the Dave Jones band?

(Same objection.)

Ans. 17. I think he did.

J. TILNEY.

STATE OF NEW YORK,
City and County of New York, ss:

At said city and county of New York, on the 27th day of October, A. D. 1873, before me personally appeared the above-named Joseph Tilney, and made oath that the foregoing deposition by him subscribed contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co., at the time and place named in the notice hereto attached, to be used upon the hearing of an interference between the claims of the said George W. Kidd & Co. and those of Mills, Johnson & Co., before the Commissioner of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the original notice hereto annexed, and attended by Philo Chase, their counsel.

[L. S.]

SAM. TRO. SMITH,
Notary Public, New York County.

Counsel for George W. Kidd & Co. puts in evidence a registered trade-mark, registered by the firm of S. N. Pike & Co. March 9, 1869, namely, "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio;" which is marked Exhibit A, October 27, A. D. 1873. S. T. S., N. P.

119 Also puts in evidence a registered trade-mark, registered by the firm of S. N. Pike & Co., February 24, 1869, namely, "Dave Jones, Paris, Ky., Bourbon," which is marked Exhibit B, October 27, A. D. 1873. S. T. S., N. P.

ISAAC BRISTOW, being then produced and duly sworn as a witness in behalf of George W. Kidd & Co., in answer to questions proposed to him by A. J. Todd, esq., counsel for said George W. Kidd & Co., testified as follows:

Int. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is Isaac Bristow; I am fifty-one years of age; reside in Brooklyn, N. Y.; and am a distiller, rectifier, and wholesale liquor-dealer.

Int. 2. Were you ever engaged in the house of S. N. Pike & Co., doing business in the cities of New York and Cincinnati? If so, state when you commenced to be so engaged with that firm, and in what capacity?

Ans. 2. Yes; I was first connected with them in 1864. I was engaged, first of all, as the manager of a wholesale grocery business, from January till October of that year, when this firm of S. N. Pike & Co. was formed as distillers, rectifiers, and wholesale liquor dealers, doing business in New York and Cincinnati, as their cashier and general agent.

Int. 3. Have you knowledge of their adoption of the two trade-marks in controversy, namely, the S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio, and the Dave Jones, Paris, Ky., Bourbon?

Ans. 3. Yes.

Int. 4. How did they use these trade-marks?

Ans. 4. The Magnolia was put on the barrels with a stencil-plate, the Dave Jones was burned into the barrels of whiskey with an iron brand.

Int. 5. State whether this whiskey which was so branded was a peculiar kind or character of whiskey, which became known to the customers of S. N. Pike & Co. as such?

120 Ans. 5. Yes, it was. The Magnolia was a rectified whiskey, the Dave Jones a compounded or blended whiskey.

Int. 6. What, if any, firm succeeded to the business of S. N. Pike & Co., and when?

Ans. 6. George W. Kidd & Co., in January, 1872. The firm-name was not changed until May following.

Int. 7. Did such last-named firm succeed to the rights and interests of S. N. Pike & Co. to the trade marks in question?

(Objected to as assuming legal conclusions and facts not proved.)

Ans. 7. Yes; they did.

Int. 8. Has S. N. Pike & Co., also their successors, George W. Kidd & Co., since the change of the firm, continued to use both of said trade-marks as brands, in their business of manufacturing and selling whiskey, since the year 1864?

Ans. 8. Yes; without interruption.

Int. 9. Did you become a member of the firm of S. N. Pike & Co.? If so, when?

Ans. 9. Yes; in January, 1872.

Int. 10. At the time that you went into that firm, was there any un-

derstanding or agreement with the members of that firm that you were to have simply an interest in the profits of the business, and state who were the members of the firm at the time when you so associated yourself with them in business?

(Objected to as immaterial, irrelevant, and whatever agreement might be made between the members of the firm of S. N. Pike & Co. did not and could not affect the rights of Mills, Johnson & Co., made without their knowledge and consent.)

Ans. 10. None whatever. S. N. Pike and George W. Kidd were the partners at the time I became associated with the firm.

Int. 11. Was there ever any money value set on these trade-
121 marks in controversy by the firm of S. N. Pike & Co., or any of its members, or, in fact, on any of their trade-marks as such?

(Objected to as immaterial and irrelevant.)

Ans. 11. They were taken into the stock account as distillery fittings, and the fittings altogether valued at $15,000.

Int. 12. When was this?

Ans. 12. In January, 1872.

Int. 13. Were they ever registered? If so, in whose name, and about when?

Ans. 13. They were registered in the year 1869, in the county clerk's office, about February and March in that year. One in February, and one in March.

Int. 14. Had S. N. Pike knowledge of this registration, as well as the other members of the firm?

(Objected to as immaterial.)

Ans. 14. Yes, he had; it was done by his advice.

Int. 15. Has your right to continue the use of these two trade-marks in controversy in name of G. W. Kidd & Co., as successors of S. N. Pike & Co., ever been questioned by anybody?

Ans. 15. Never.

Int. 16. Has your present firm the possession of the pattern-mould of the "Dave Jones, Paris, Ky., Bourbon" trade-mark brand, which was the property of S. N. Pike & Co. in the year 1864?

(Objected to as assuming that S. N. Pike & Co. owned the brand in 1864.)

Ans. 16. I believe they have.

And in answer to questions proposed to him by Ph. Chase, esq., counsel for Mills, Johnson & Co., by way of cross-examination, the witness testifies as follows:

X Int. 17. Have you not been informed, and do you not believe, that Mills, Johnson & Co., of Cincinnati, have constantly used the said Magnolia and Dave Jones trade-marks and brands in their business since the year 1868?

(Objected to as immaterial, and not in cross-examination.)

122 Ans. 17. I have never been so informed, and I have no right to believe.

X Int. 18. Will you swear that you do not believe that Mills, Johnson & Co. have not been in the constant use of said brands and trade-marks since the year 1868?

(Same objection.)

Ans. 18. They may. I don't know, and what belief can I have?

X Int. 19. Question repeated.

(Same objection.)

Ans. 19. I have no definite belief in regard to the matter.

X Int. 20. Were you not present during the examination of Mr. Tilney

and Mr. Kidd, when they both testified that Mills, Johnson & Co. had used both of said brands since the year 1868?

(Objected to as not correctly stating the testimony of the witnesses, both Mr. Kidd and Mr. Tilney simply testifying that they were so informed.

Counsel for Mills, Johnson & Co. object to counsel misstating in his objection the testimony of previous witnesses, and thereby attempting to instruct the witness.

Counsel for applicants refers the commissioner to George W. Kidd's first deposition, answer to interrogatory 49, and Joseph Tilney's first deposition, answer to cross 36, as a reply to the last objection; and also desires it noted that the witness had given his answer before the objection to the question was made, but not taken down, and hence could not have instructed the witness, which intimation is denied, as the objection was not made for that purpose.

Counsel for Mills, Johnson & Co. refer the commissioner to X Int. 51 to George W. Kidd, the same being, "Have said Mills, Johnson & Co. manufactured and sold very large quantities of whiskey under said brand and trade-marks since October, 1868, and, if yea, have you
123 been constantly cognizant of their doing so?" The answer to which is, "I believe they have, and am so informed, and am so cognizant." And to the 37th X interrogatory to Joseph Tilney, "Were you so informed, and have you been so cognizant of the fact ever since said purchase in 1868?" the answer to which is, "Yes."

Counsel for applicants desires it noted that that part of Mr. Kidd's answer "so cognizant" was really put in his mouth by examining counsel, and Mr. Kidd repeated it after him, and which really gives the answer no greater force than as above stated; and in Mr. Tilney's testimony the same counsel then put it into his mouth in the regular way through the record by inserting it in the question.

Counsel for Mills, Johnson & Co. object to the last statement of applicants' counsel as untrue, and as attempting to make an argument while taking testimony.)

Ans. 20. Yes; I was present at this examination.

X Int. 21. And did you hear the questions and answers referred to and repeated in the respective objections to the last question?

Ans. 21. Yes; but I don't remember what their testimony was.

X Int. 22. Assuming their answers as referred to and repeated now to you as the answers actually given by them, will you now say you have no belief as to whether Mills, Johnson & Co. have used their trade marks in their business since the year 1868?

(Objected to as immaterial, not in cross-examination, and hypothetical.)

Ans. 22. I can't assume anything, and I don't see how their statements can affect my belief.

X Int. 23. Are not Mr. Kidd and Mr. Tilney credible witnesses, and entitled to belief?

124 (Same objection, and as their testimony appears to be founded on hearsay, it is calling for hearsay founded upon hearsay, hence not in any sense evidence.

Also objected to, because if the fact is such, and material, it is in the parties' own power to furnish the best evidence; that is, so far as this question has a bearing upon the alleged facts sought to be reached.)

Ans. 23. I don't consider myself a judge in the matter.

X Int. 24. How long have you been acquainted with Messrs. Tilney and Kidd?

Ans. 24. Several years.

X Int. 25. Have you never seen nor heard of whiskey coming from Mills, Johnson & Co., of Cincinnati, having thereon said brands and trade-marks?

(Objected to as immaterial, and not in cross-examination.)

Ans. 25. I can't say that I have.

X Int. 26. Have you not read a copy of the application of Mills, Johnson & Co. for the registration of the e trade-marks?

(Same objection.)

Ans. 26. No; I have not.

X Int. 27. Have you not heard that they made such registration?

(Same objection.)

Ans. 27. Yes; I have.

X Int. 28. When did you so hear it?

(Same objection.)

Ans. 28. After we had made our application for the same thing.

X Int. 29. What personal knowledge have you that S. N. Pike & Co. attempted to register a copyright of these brands in 1869?

Ans. 29. I had conversations with Mr. Pike about it myself.

X Int. 30. When and where did such conversations take place, and who were present?

125 Ans. 30. In the beginning of the year 1869, in the office of S. N. Pike & Co.; Mr. Kidd and Mr. Pike and myself were together.

X Int. 31. Do you refer to the conversation when Mr. Pike stated you should not interfere or use the brands in Cincinnati?

(Objected to as an illogical deduction, not in cross-examination, and as this witness has not referred to any such matter.)

Ans. 31. No; I do not.

X Int. 32. Were you present at such conversation testified to by Mr. Kidd?

(Objected to, not in cross-examination, and immaterial.)

Ans. 32. No; I was not.

X Int. 33. Did not Mr. Kidd inform you that Mr. Pike said you should not use these brands in Cincinnati?

(Same objection continued.)

Ans. 33. No; he did not.

X Int. 34. Do you not know that Mills, Johnson & Co. objected to the firm of S. N. Pike & Co.'s putting up whiskey in Cincinnati under said brands?

(Same objection continued.)

Ans. 34. I don't know; I may have heard something about it.

X Int. 35. Do you not know, or did you not hear, that there were large quantities of the Dave Jones brand of whiskey from Mills, Johnson & Co.'s in Boston and other markets?

(Same objection.)

Ans. 35. I have never heard nor do I know that Mills, Johnson & Co. ever sold large quantities of Dave Jones whiskey in Boston or elsewhere, and I don't believe they did.

X Int. 36. Do you know, or have you heard, of their selling any in Boston?

(Same objection.)

Ans. 36. No; I do not.

126 X Int. 37. Did you ever know or did you ever hear of the firm of Clark & Co., of Boston, buying of Mills, Johnson & Co. the Dave Jones brand?

(Same objection.)

Ans. 37. No; but I know that S. N. Pike & Co. sold them large quantities.

(Counsel objects to the witness giving irresponsive answers.)

X Int. 38. What do you mean by the words distillery fittings in your direct examination?

Ans. 38. Everything that is necessary to carry on that business, the brands being an important part.

X Int. 39. State the articles, besides the brands, included in the distillery fittings about which you have testified.

Ans. 39. The stills and rectifiers are the principal things.

X Int. 40. How many stills, and how many rectifiers and other articles connected therewith, which you say passed to the new firm of S. N. Pike & Co., and for which $15,000 was the estimated value?

Ans. 40. I think there were three stills and two centrifugal machines and pipes connected therewith.

X Int. 41. How long had said stills been in use?

Ans. 41. Five or six years; I think they were old ones when we got them; we have them in use now.

X Int. 42. How large are those stills?

Ans. 42. I don't know; Mr. Kidd attends to the practical part of the business.

X Int. 43. Do you know what new stills cost?

Ans. 43. I have no idea.

X Int. 44. Do you know that stills having the capacity of 90 to 100 barrels cost almost $10,000 apiece?

Ans. 44. No; I don't.

X Int. 45. What capital did you put into the firm of S. N. Pike & Co.?

Ans. 45. I don't know as I put any capital in. I was not to furnish any capital, but had a balance due me on the books of somewhere in the neighborhood of $8,000. Mr. Pike and Mr. Kidd were to furnish the capital.

127 X Int. 46. What interest were you to have in the profits of the concern?

(Objected to as immaterial.)

Ans. 46. I was to get three-sixteenths.

ISAAC BRISTOW.

Adjourned to October 30, 1873, at 10 o'clock a. m., at same place, by consent of parties.

STATE OF NEW YORK,
City and County of New York, ss:

At said city and county of New York, on the 27th day of October, A. D. 1873, before me personally appeared the above-named Isaac Bristow, and made oath that the foregoing deposition, by him subscribed, contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co., at the time and place named in the notice hereto attached, to be used upon the hearing of an interference between the claims of the said George W. Kidd & Co. and those of Mills, Johnson & Co., before the Commissioner of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the original notice hereto annexed, and attended by Philo Chase, esq., their counsel.

[L. S.]

SAM. TRO. SMITH,
Notary Public, New York County.

OCTOBER 30, 1873—10 a. m.

Met pursuant to adjournment, at same place. Parties present with counsel as before.

JOSEPH TILNEY, recalled, in answer to questions proposed by A. J. Todd, testifies as follows:

Int. 1. Having reference to the X 17th interrogatory, in which you were asked respecting the Boston trade for the Dave Jones brand, and in which interrogatory it was assumed that George Simmons was
128 Mr. Pike's salesman, now state whose salesman George Simmons was at the time that the Dave Jones brand was started in the Boston trade.

(Objected to for stating that any fact was assumed in the question, the question showing for itself; and that it is irregular and improper to again call the witness upon matter about which he has once been fully interrogated.)

Ans. 1. Mr. Simmons was the salesman of S. N. Pike & Co. and also of Mr. Pike when he was alone in business. I think at the time the Dave Jones brand was started in Boston he was salesman of S. N. Pike & Co.

And in answer to questions proposed to him by Ph. Chase, esq., by way of cross-examination, the witness testifies as follows:

X Int. 2. Are you positive that Simmons was salesman of S. N. Pike & Company or S. N. Pike alone at the time the Boston trade was started?

Ans. 2. I feel pretty sure that he was salesman for S. N. Pike & Co. at that time.

X Int. 3. If Simmons was salesman of S. N. Pike & Co. at the time the Boston trade was started, who then composed the firm of S. N. Pike & Co.?

Ans. 3. S. N. Pike and Philip Pike, with Lawrence Myers as silent partner.

X Int. 4. Have you in your possession or under your control the two inventories of S. N. Pike & Co.—the one made at the time of the formation of the partnership of S. N. Pike & Co., composed of Pike, Tilney, and Kidd, and the other the inventory of the late firm of S. N. Pike & Co., composed of Pike, Kidd, and Bristow, and made since Mr. Pike's decease?

(Objected to as improper, as it is not in cross-examination; and notice is given to counsel for Mills, Johnson & Co. that he is making the witness his own, and must treat his testimony as such, though it is done at the applicants' expense.)

129 Ans. 4. I have not got the inventory of the firm composed of Pike, Tilney, and Kidd. That is, I believe, in the hands of Mr. Williamson, of Cincinnati. I have possession of the inventory of the firm composed of Pike, Kidd, and Bristow.

(Inventory shown to counsel for Mills, Johnson & Co. by the witness.)

X Int. 5. In the inventory last mentioned, do either of the trade-marks in question appear?

(Objected to as above, also as incompetent, as that is a question of law, to be determined upon the facts already in evidence, as well as from the inventory and evidence given respecting its contents.)

Ans. 5. I do not know. I have not read the inventory.

X Int. 6. Please examine it, and state whether either of the trade-marks are included in the inventory.

(Same objections and as immaterial. The document itself should be produced.)

Ans. 6. I have examined the inventory, and I find no specific mention of any trade-marks, except as applied to whiskey and barrels, therein mentioned.

X Int. 7. Do you mean by your last answer to say you find no trade-marks mentioned as such?

(Objected to as last above and as indefinite.)

Ans. 7. Yes.

X Int. 8. Is there included in said inventory any valuation or appraisement of, or any sum included for, either of said trade-marks?

(Objections to cross 6th interrogatory continued.)

Ans. 8. I do not see any specific mention of the trade-marks, as such, in that inventory.

X Int. 9. Who prepared and assisted in preparing said last-mentioned inventory, and where was the said made, and when?

(Same objections continued.)

Ans. 9. I don't know who prepared the inventory. It is
130 written out here in the handwriting of Mr. George Mitchell. It was made in New York, January 15, 1872.

X Int. 10. By whom was it sent to you and when?

(Same objections continued.)

Ans. 10. This book was sent to me by Mr. George W. Kidd or Mr. Bristow two or three months ago.

X Int. 11. What does said inventory purport to contain?

(Same objections, and as indefinite, and as calling for a conclusion instead of facts.)

Ans. 11. I would call it an inventory of the stock on hand at that time. There are no book-debts in it.

X Int. 12. Have Mr. George W. Kidd and Mr. Bristow, the surviving partners of the late firm of S. N. Pike & Co., ever made any return to you or to either of the executors of S. N. Pike, to your knowledge, of either of the trade-marks in controversy?

(Objected to as immaterial, and as not in cross-examination.)

Ans. 12. No.

And in answer to questions proposed to him by A. J. Todd, esq., in further direct examination, the witness testifies as follows:

R. D. 13 (de bene esse). Has there been any return made yet to you or the other executors of any of the affairs of the late firm of S. N. Pike & Co. by either George W. Kidd or Mr. Bristow?

Ans. 13. Yes; they have given me an inventory of the stock on hand December 7 or 9, 1872, made immediately after Mr. Pike's death.

R. D. 14 (de bene esse). Is that inventory of the effects of that house complete or not?

Ans. 14. No; I should think not. It merely purports to be an inventory of the stock on hand at that time.

R. D. 15 (de bene esse). Is the item of distillery fittings included in that inventory?

Ans. 15. No.

R. D. 16 (de bene esse). Having reference to the item "distil-
131 lery fittings" in the inventory of Pike and Kidd and Bristow, of January 15, 1872, do you know and can you tell what was the understanding between these parties as to what was included in that item, or as to whether the trade-marks and brands in question were or were not included therein?

Objected to as leading, and as immaterial, and that no understanding as between such parties can affect the legal rights of Mills, Johnson & Co.)

Ans. 16. I do not. The item of distillery fitting was inserted in this statement, and afterwards taken out and put into the ledger account as one of the assets assumed by the firm of S. N. Pike & Co., composed of Pike, Kidd, and Bristow.

And in answer to questions proposed to him by Ph. Chase, by way of cross-examination, the witness testifies as follows:

X Int. 17. At what price or sum were the distillery fittings put in at the formation of the partnership of S. N. Pike & Co., composed of Pike, Kidd, and Bristow?

(Objected to as not in cross-examination, and as the inventory is the best evidence of the fact.)

Ans. 17. Fifteen thousand dollars.

X Int. 18. How many stills and rectifiers were included in said distillery fittings?

(Same objections continued.)

Ans. 18. I do not know.

X Int. 19. How many stills and rectifiers had the firm of S. N. Pike & Co. when you ceased to be a member?

(Same objections continued.)

Ans. 19. I do not know.

X Int. 20. Assuming that the answer to the 37th X Int. to Mr. Bristow is correct, that there were three stills and two centrifugal machines and pipes connected therewith, which were put into the firm of S. N. Pike & Co., January, 1872, what, according to your best judgment, were said stills and centrifugal machines and pipes worth?

132 (Objected to as not in cross-examination, and as offering the witness as an expert, which is irregular and improper under the circumstances as well as incompetent, as the proper foundation for the question is not laid.)

Ans. 20. I can't say.

X Int. 21. Have you any knowledge of the value of said stills as were used by S. N. Pike & Co.?

(Same objections.)

Ans. 21. I have not.

X Int. 22. Has any appraisement been made of the estate in New York or elsewhere of S. N. Pike since his decease?

Ans. 22. No.

J. TILNEY.

STATE OF NEW YORK,
City and County of New York, ss:

At said city and county of New York, on the 30th day of October, A. D. 1873, before me personally appeared the above-named Joseph Tilney, and made oath that the foregoing deposition by him subscribed contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co. at the time and place named in the notice hereto attached, to be used upon the hearing of an interference between the claims of the said George W. Kidd & Co. and Mills, Johnson & Co., before the Commissioners of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the original notice hereto annexed, and attended by Philo Chase, esq., their counsel.

[L. S.]

SAM. TRO. SMITH,
Notary Public, New York County.

CHARLES H. ROBERTS, being then produced and duly sworn as a witness on behalf of George W. Kidd & Co., testifies as follows:

Int. 1. What is your name, age, residence, and occupation?

133 Ans. 1. My name is Charles H. Roberts; thirty-one years of age; reside in Newark, N. J.; am a bookkeeper for the firm of George W. Kidd & Co.

Int. 2. Please state whether you were employed by the firm of which George W. Kidd & Co. are the successors, namely, S. N. Pike & Co.

Ans. 2. I was.

Int. 3. State whether you have any knowledge of the firm of S. N. Pike & Co. having copyrighted and registered the trade-marks "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," and "Dave Jones, Paris, Ky., Bourbon."

(Objected to as immaterial, as the acts of S. N. Pike & Co. in regard to copyrighting cannot affect the rights of Mills, Johnson & Co.)

Ans. 3. I have.

Int. 4. State whether such registering and copyrighting was done in the name of S. N. Pike & Co., and also whether S. N. Pike personally had knowledge thereof.

(Objected to as immaterial and incompetent.)

Ans. 4. In regard to the first part of the question, I do not actually know, as I did not see the registering, but I believe it. In regard to Mr. Pike's knowledge of the registering, I know that he had such knowledge.

(The part of the answer relating to the witness's belief objected to by counsel for Mills, Johnson & Co.)

Int. 5. Have you knowledge of the entry made in the inventory at the time that Mr. Bristow became a member of the firm of S. N. Pike & Co. of "distillery fittings"; and, if so, have you any knowledge of the understanding that S. N. Pike, George W. Kidd, and Isaac Bristow had respecting the matter of whether the trade-marks above referred to were included therein or not? If so, state it.

(Objected to as immaterial and incompetent.)

Ans. 5. I have. It was intended to cover everything connected with the working or working part of the distillery necessary to the carrying on of the business, including these trade-marks referred to.

134 And in answer to questions proposed to him by Ph. Chase, esq., counsel for Mills, Johnson & Co., by way of cross-examination, the witness testifies as follows:

X Int. 6. How do you know what was the intention or understanding of the parties?

Ans. 6. I know it from the parties themselves.

X Int. 7. Was any value placed upon the trade-marks?

Ans. 7. Not especially mentioned.

X Int. 8. Was any value assigned to the trade-marks?

Ans. 8. Not especially mentioned.

X Int. 9. Were any trade-marks particularly mentioned?

Ans. 9. Not in that connection.

X Int. 10. How many different trade-marks did Mr. Pike have?

(Objected to as assuming what is not proved—namely, that Mr. Pike had trade-marks—and as too general and indefinite.

The registrants object to counsel's attempting to instruct the witness under the guise of an objection.

Counsel for applicants emphatically denies the charge, and says that the objection is interposed for the reason that this sinister way of put-

ting a question is calculated to mislead the witness, and hence should be called to the attention of the commissioner, as it has been occasionally indulged in during the course of the examination.

Registrants' counsel objects to the statement of applicants' counsel as entirely untrue, and as made simply by way of a splurge.

Applicants' counsel is willing to leave the truth of his remarks to be judged of by the record, but not by the counsel for Mills, Johnson & Co.)

Ans. 10. I am not aware that Mr. Pike had any.

X Int. 11. Do you know of your own knowledge what trade-marks he had or did not have?

135 (Same objection.)

Ans. 11. I do not.

X Int. 12. How many different trade-marks were used by the firm of S. N. Pike & Co. in their business?

Ans. 12. I don't remember.

X Int. 13. Was any memorandum made of the items included, or intended to be included, in the item of "distillery fittings;" and, if yea, when was such memorandum made, and where is it?

(Objected to as immaterial.)

Ans. 13. I don't know that there was.

X Int. 14. Did you hear any discussion as to what should be included in the item "distillery fittings?"

Ans. 14. I did not.

X Int. 15. Did you hear any enumeration of the various articles included, or intended to be included, in the item of "distillery fittings?"

Ans. 15. I did not.

X Int. 16. Are you now in the employ of George W. Kidd & Co.; and if so, in what capacity?

Ans. 16. I am; as book-keeper.

X Int. 17. How long have you been in their employ?

Ans. 17. Since the formation of the firm of George W. Kidd & Co., December 7, 1872.

X Int. 18. Do you know what trade marks were copyrighted, or attempted to be copyrighted, by the firm of S. M. Pike & Co.?

Ans. 18. I know some of them.

X Int. 19. Who suggested to Mr. Pike the copyrighting of trade-marks, and when?

(Objected to as assuming what is not shown to be the case, and as again intimating what is not proved to be the fact, viz, that Mr. Pike was personally possessed of trade-marks.)

Registrants' counsel again protests against this interference with the cross-examination of the witness whenever he is apprehensive of an unfavorable answer.

136 Counsel for applicants denies that such is the reason for interposing the objection, but to refer the commissioner to this attempt to ensnare the witness, should he give an answer not observing the improper reading of the question.)

Ans. 19. I don't know that it was suggested to him.

X Int. 20. Who first suggested the copyrighting of trade marks?

(Objected to as too general.)

Ans. 20. I don't know.

X Int. 21. When was the copyrighting of trade-marks suggested?

(Same objection.)

Ans. 21. I don't know.

X Int. 22. When was the copyrighting suggested?

(Same objection.)

Ans. 22. I don't know.

And in answer to further questions proposed by A. J. TODD, esq., by way of further direct examination, the witness testifies as follows:

R. D. 23. Did S. N. Pike personally claim to own any trade-mark as against the firm of S. N. Pike & Co.?

(Objected to as immaterial and incompetent.)

Ans. 23. Not to my knowledge.

R. D. 24. What was your position in the house of S. N. Pike & Co. at the time when they registered and copyrighted these trade-marks in question?

Ans. 24. I was book-keeper.

R. D. 25. If S. N. Pike had claimed to own any trade-mark personally as against the firm of S. N. Pike & Co., would you or not have been likely to have known of it?

(Objected to as incompetent and suggestive.)

Ans. 25. I would.

R. D. Int. 26. Who paid for the registering and copyrighting of these trade-marks in question?

(Objected to as immaterial.)

Ans. 26. The firm of S. N. Pike & Co.

137 R. D. Int. 27. Who paid for the making of the brands of these copyrights in question?

(Objected to as immaterial.)

Ans. 27. The firm of S. N. Pike & Co.

And in answer to further questions proposed to him by Ph. CHASE, esq., by way of cross-examination, the witness testifies as follows:

X Int. 28. How much was paid for making the Dave Jones brand?

Ans. 28. I don't recollect.

X Int. 29. How much was paid for making the Magnolia brand?

Ans. 29. I don't recollect.

X Int. 30. Were these brands made after you went into the employ of S. N. Pike & Co., December, 1872?

Ans. 30. I did not go into the employ of S. N. Pike & Co. in December, 1872.

X Int. 31. When were said brands made?

Ans. 31. They were made from time to time as they were worn out in use.

X Int. 32. When did you first know of S. N. Pike & Co. having any of these brands made?

Ans. 32. I don't recollect the exact date.

X Int. 33. Can you give any idea of the time?

Ans. 33. No, I cannot.

X Int. 34. Have you any particular recollection of the payment by S. N. Pike & Co. for making either of the brands in question? If so, state the time or times, amounts, and to whom paid.

Ans. 34. I have not.

X Int. 35. Has your attention been called to any item or items paid by S. N. Pike & Co. for such brands? If so, state when and by whom your attention was so called and the occasion thereof.

Ans. 35. I don't recollect that it has.

X Int. 36. Do your statements as to the payment for making the brands also apply to the payment for the registering or copyrighting?

138 Ans. 36. Not entirely.

X Int. 37. What difference do you make?

Ans. 37. I have a much more distinct recollection of the payment for the copyrighting than I have of any particular payment for making the brands.

X Int. 38. What particular recollection have you as to the payment for copyrighting?

Ans. 38. I recollect the particular payment for the copyrighting.

X Int. 39. State when, where, & by whom, and to whom that payment was made.

Ans. 39. I don't recollect the date, nor do I know to whom the payment was made, nor the amount. It was made by John S. Kidd; he transacted the business.

X Int. 40. Is this all the recollection you have as to payments for copyrighting?

Ans. 40. It is.

X Int. 41. Who was present when this payment was made by John S. Kidd?

Ans. 41. I don't know.

X Int. 42. Where was the payment made?

Ans. 42. At our office.

X Int. 43. Was there anything in particular to make you remember the payment of this item more than any other; and, if so, what was it?

Ans. 43. Nothing, except that the copyrighting had been a matter of conversation in our office.

X Int. 44. Do you recollect of the payment of all items or matters about which there has been previous conversation?

Ans. 44. No.

X Int. 45. Why, then, do you remember this more than others?

Ans. 45. I don't know why particularly.

X Int. 46. Did you ever hear Mr. Pike say what trade-marks he owned, or what trade-marks he did not own?

(Objected to as already answered, and for reasons already hereinbefore stated.)

139 Ans. 46. I never heard him say he owned any.

X Int. 47. Did you ever hear Mr. Pike claim an interest in any trade-marks?

Ans. 47. I don't recollect.

And in answer to further questions proposed to him by A. J. Todd, esq., in direct examination, the witness testifies as follows:

R. D. 48. Do you know of Mr. Pike making any change or alteration in any copyright of either of the trade-marks in question before the same was actually copyrighted? If so, with reference to which trade-mark was it done?

(Objected to as immaterial and incompetent.)

Ans. 48. Mr. Pike made some alterations in the original draught for the copyright of the Dave Jones brand.

R. D. 49. Were his alterations adopted by the firm of S. N. Pike & Co.?

(Same objection.)

Ans. 49. They were.

And in answer to further questions, proposed by way of cross-examination by Ph. Chase, esq., the witness testifies as follows:

X Int. 50. What alterations in the original draught were made?

Ans. 50. They were changes in grammatical construction.

X Int. 51. What changes in grammatical construction?

Ans. 51. I don't recollect.

X Int. 52. Was there a grammatical discussion at that time?

Ans. 52. There might have been.

X Int. 53. Between whom?

Ans. 53. Between Mr. Pike, Mr. Kidd, and Mr. Bristow.

X Int. 54. Do you know what the grammatical discussion between Messrs. Pike, Kidd, and Bristow was about?

Ans. 54. About the wording of this copyright.

X Int. 55. What particular points were raised in this grammatical discussion?

Ans. 55. I don't recollect.

140 X Int. 56. Did either party to this discussion cite any grammatical authorities?

Ans. 56. I don't recollect.

X Int. 57. Of the three, whom did you consider the best?

Ans. 57. I don't consider myself competent to judge.

X Int. 58. How many brands were included in the same papers with the Dave Jones brand?

Ans. 58. I don't recollect.

X Int. 59. Were there not quite a large number?

Ans. 59. I don't recollect.

X Int. 60. Do you mean to say that the grammatical discussion related to these papers without reference to a particular brand?

Ans. 60. I mean to say that the discussion related to the copyright of the Dave Jones brand, the general wording of which was adopted in the copyrighting of the other brands.

X Int. 61. If quite a number of brands were included in the same papers, how can you state that the grammatical discussion referred particularly to the Dave Jones brand?

(Objected to, as the witness has made no such statement, and as hypothetical.)

Ans. 61. I don't know that there were a number of them included in the same papers.

X Int. 62. Suppose there were.

(Objected to as hypothetical.)

Ans. 62. The Dave Jones brand was the first brand that it was suggested to copyright in my hearing, and the draught of that having been adopted, the others were based upon it.

X Int. 63. Who prepared the papers for such copyrights?

Ans. 63. I think the original draught was made by Mr. Bristow.

X Int. 64. Was any lawyer employed in drawing papers?

Ans. 64. I don't recollect.

X Int. 65. Was John S. Kidd present at the grammatical discussion, and did he take part in it?

Ans. 65. I don't recollect.

141 X Int. 66. Did not John S. Kidd procure the papers to be prepared by a lawyer or some one else outside of the office of S. N. Pike & Co.?

Ans. 66. I don't recollect.

C. H. ROBERTS.

STATE OF NEW YORK,
City and County of New York, ss:

At said city and county of New York, on the 30th day of October, A. D. 1873, before me personally appeared the above named Charles H. Roberts, and made oath that the foregoing deposition by him subscribed contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co., at the

time and place named in the notice hereto attached, to be used upon the hearing of an interference between the claims of the said George W. Kidd & Co. and Milis, Johnson & Co., before the Commissioner of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the original notice hereto annexed, and attended by Philo Chase, esq., their counsel.

[L. S.]

SAM. TRO. SMITH,
Notary Public, New York County.

JOHN ROBINSON, being then produced and duly sworn on behalf of George W. Kidd & Co., in answer to questions proposed by A. J. Todd, esq., testifies as follows:

Int. 1. What is your name, age, residence, and occupation?

Ans. 1. My name is John Robinson; age, 42. I reside in Brooklyn, N. Y. My business is brand manufacturer, etc.

Int. 2. Have you ever made any brands of the trade-mark "Dave Jones, Paris, Ky., Bourbon" for the firm of S. N. Pike & Co. since the year 1868? And if so, state whether or not you were paid for the making of said brands by said firm of S. N. Pike & Co.

142 Ans. 2. I have, and they paid me.

And in answer to questions proposed to him by Ph. Chase, esq., counsel for Mills, Johnson & Co., the witness testifies as follows:

X Int. 3. When and by whom were you paid?

Ans. 3. I was paid for one in August, 1869, by the company. That was a Dave Jones brand, Paris, Ky., bourbon. I don't recollect by what person I was paid. The bill was made out to the firm of S. N. Pike & Co., and they paid it.

J. ROBINSON.

STATE OF NEW YORK,
City and County of New York, ss:

At said city and county of New York, on the 30th day of October, A. D. 1873, before me personally appeared the above named John Robinson, and made oath that the foregoing deposition by him subscribed contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co., at the time and place named in the notice hereto attached, to be used upon the hearing of an interference between the claims of the said George W. Kidd & Co. and Mills, Johnson & Co., before the Commissioner of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the original notice hereto annexed, and attended by Philo Chase, esq., their counsel.

[L. S.]

SAM. TRO. SMITH,
Notary Public, New York County.

GEORGE MITCHELL, being then produced and duly sworn on the part of George W. Kidd & Co., in answer to questions proposed by A. J. Todd, esq., testifies as follows:

Int. 1. What is your name, age, residence, and occupation?

143 Ans. 1. My name is George Mitchell; age, forty years; I reside in New York City; am a clerk for George W. Kidd & Co.

Int. 2. Please state whether you were employed by the firm of which George W. Kidd & Co. are the successors—namely, S. N. Pike & Co.

Ans. 2. I was.

Int. 3. State whether you have any knowledge of the firm of S. N. Pike & Co. having copyrighted and registered the trade-marks "S. N. Pike, Magnolia Whiskey, Cincinnati, Ohio," and "Dave Jones, Paris, Ky., Bourbon."

(Objected to as immaterial and incompetent.)

Ans. 3. Yes; I have.

Int. 4. State whether such registering and copyrighting was done in the name of S. N. Pike & Co., and also whether S. N. Pike personally had knowledge thereof.

(Same objection.)

Ans. 4. It was done in the name of S. N. Pike & Co., and S. N. Pike had knowledge of it at the time.

Int. 5. Have you knowledge of the entry made in the inventory at the time that Mr. Bristow became a member of the firm of S. N. Pike & Co. of "distillery fittings," and if so, have you any knowledge of the understanding that S. N. Pike, George W. Kidd, and Isaac Bristow had respecting the matter of whether the trade-marks above referred to were included therein or not? If so, state it.

(Objected to as irrelevant and incompetent.)

Ans. 5. I have a knowledge of the entry; I made the entry, and there was a discussion, I remember, about the price, and Mr. Pike finally put the price at $15,000, and they agreed to it, and I understood that it included brands and trade-marks, and everything else that we had for running the business with.

Registrants' counsel objects to the witness stating his belief or understanding as to the contract between S. N. Pike, Kidd, and Bristow.

And in answer to questions proposed to him by Ph. Chase, esq.,
144 counsel for Mills, Johnson & Co., by way of cross-examination, the witness testified as follows:

X Int. 6. How many stills and rectifiers, etc., were included in the item "distillery fittings"?

Ans. 6. I don't really know how many there was in the house—all there was in the house.

X Int. 7. Have you any knowledge of the value of the stills and rectifiers in the place?

Ans. 7. I have not.

X Int. 8. Were any particular items mentioned as included in the "distillery fittings"?

(Objected to as immaterial.)

Ans. 8. No.

X Int. 9. Your belief, then, is based upon what you understand "distillery fittings" to mean?

(Objected to as an improper inference.)

Ans. 9. Partly on that, and partly on conversation I heard between the parties.

X Int. 10. Have you had any conversation with any person as to the testimony you would give in this matter; and, if so, when, and with whom?

Ans. 10. I have had conversation with Mr. Todd. Mr. Bristow simply told me to come up here, they would want me as a witness in this matter.

GEO. MITCHELL.

Counsel for applicants puts in evidence a certified copy of a registration of a trade-mark in the United States district court clerk's office for

the southern district of New York, marked Exhibit D, October 30, 1873. S. T. S., N. P.

(Objected to by counsel for the registrants as being immaterial, and not being either of the trade-marks in question.)

No further evidence being offered, the examination was here closed.

New York, November 4, 1873.

SAM. TRO. SMITH,
Notary Public, New York County.

145 *George Mitchell.*

STATE OF NEW YORK,
City and County of New York, ss:

At the said city and county of New York, on the 30th day of October, A. D. 1873, before me personally appeared the above-named George Mitchell, and made oath that the foregoing deposition by him subscribed contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of George W. Kidd & Co., at the time and place named in the notice hereto attached, to be used on the hearing of an interference between the claims of George W. Kidd & Co, and those of Mills, Johnson & Co., before the Commissioner of Patents, on the 27th day of November, 1873.

The said Mills, Johnson & Co. were duly notified, as appears by the original notice hereto annexed, and attended by Philo Chase, esq., their counsel.

[L. S.]

SAM. TRO. SMITH.
Notary Public, New York County.

146 Before the Commissioner of Patents.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," and application of George W. Kidd & Co.

Also,

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "Dave Jones, Paris, Ky., Bourbon," and application of Geo. W. Kidd & Co. for registration of same.

Consented that the time within which the applicants, Kidd & Co., may take testimony in the above cases be enlarged to and including Monday, October 27, 1873.

MILLS, JOHNSON & CO.

147 Before the Commissioner of Patents.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "S. N. Pike, Magnolia Whiskey, Cincinnati, Ohio," and application of George W. Kidd & Co.

Also,

In the matter of the interference between the registered trade mark of Mills, Johnson & Co., consisting of "Dave Jones, Paris, Ky., Bourbon," and application of George W. Kidd & Co.

Deposition of witnesses examined on behalf of George W. Kidd & Co., in rebuttal, pursuant to the annexed notice, at the office of A. J. Todd, esq., No. 37 Park Row, in the city of New York, on Friday, November 14, A. D. 1873.

Present, A. J. Todd, esq., counsel for George W. Kidd & Co., and Philo Chase, esq., counsel for Mills, Johnson & Co.

Examination adjourned to November 15, at 11 o'clock a. m., at the same place.

NEW YORK, *November* 15, 1873.

Met pursuant to adjournment.

A. J. Todd, esq., present as counsel for the applicant, George W. Kidd & Co.

148 Adjourned to Tuesday, November 18, 1873, at 11 o'clock a. m., at the same place.

TUESDAY, *November* 18, 1873.

Met pursuant to adjournment; parties present as before.

GEORGE W. KIDD, being produced and duly sworn as a witness on the part of George W. Kidd & Co., testifies as follows, in answer to questions proposed to him by A. J. Todd, esq., counsel for George W. Kidd & Co.:

Int. 1. William W. Johnson testifies that he commenced with Mr. Pike in January, 1861, as travelling agent in the wholesale liquor business. Now, state what the name and style of the business was in 1861, and who employed William W. Johnson—Mr. Pike individually, or the firm—as such travelling agent.

Ans. 1. The name and style of the business was S. N. Pike & Co., composed of Samuel N. Pike, Lawrence Myers, and I think Phillip Pike was not then dead; if so, he was still a member of the firm. The firm employed Mr. Johnson; Mr. Pike doubtless arranged with Mr. Johnson in behalf of the firm.

Int. 2. Mr. Johnson testifies, in answer to the 6th and 7th interrogatories, that prior to the sale to Mills, Johnson & Co., the Dave Jones brand had been used ten or twelve years, to his personal knowledge, by Samuel N. Pike; and the Magnolia brand fifteen years and over by the same party. Is this the fact or not? And what was Mr. Johnson's business previous to his engaging with S. N. Pike & Co., and when did he so engage?

Ans. 2. The firm of S. N. & H. Pike, and their successors, used the Magnolia brand probably about the period he mentions, S. N. & H. Pike having introduced the Magnolia brand. The firm of S. N. Pike & Co., composed of S. N. Pike, Lawrence Myers, and Phillip Pike, introduced the Dave Jones brand, and it was used about eight years
149 prior to the time of the sale to Mills, Johnson & Co. Mr. Johnson was employed as clerk in the Burnett House in Cincinnati when I first knew of him, and it does not appear to me possible that he could have known the business of our firm prior to the time he became connected with it. I believe the statement of Mr. Johnson, as to the time when he became connected with S. N. Pike & Co., is correct. I wish to add to the phrase, "sale to Mills, Johnson & Co.," so as to make it read, "sale of the real estate and fixtures to Mills, Johnson & Co."

Int. 4. I find that the sale of the real estate is represented by warrantee deed, Exhibit 7, the sale of the fixtures by Exhibit 3; and I also find, by Exhibit 4, S. N. Pike extended to Mills, Johnson & Co. and their

successors the use of all the brands formerly used by him in his Cincinnati house. Please state when you first had knowledge of the particular form in which this privilege to use the brands in the Cincinnati house was given to said Mills, Johnson & Co.

Ans. 4. About the 1st of November, 1870, two years after the sale by Mr. Pike.

Int. 5. State how it was that you did not know of it earlier; that is, the particular form in which the writing was made and by whom signed, whether by Mr. Pike personally, or in the firm name.

Ans. 5. The transaction was made private by Mr. Pike without conferring with me. He signed all the papers himself, and I had no means of knowing.

Int. 6. What did you understand that Mr. Pike was selling at the time?

(Objected to as incompetent; witness has no right to testify as to his understanding; and that the witness has testified that he did not know of the form of the transfers until two years afterwards.)

Ans. 6. His real estate and fixtures. He had no right to sell the brands, if he did sell them at all.

150 (The last part of the answer objected to by counsel for Mills, Johnson & Co., as the conclusion of the witness.)

Int. 7. Will you please look at the press copies of the letters written by Samuel N. Pike & Co. to Mills, Johnson & Co., dated respectively 11th Nov., 1870, 21st Nov., 1870, which are here in evidence as Exhibits 11 and 8, and state in whose handwriting those letters are, including the signatures, producing the letter-book containing them for the inspection of counsel?

(Letter-book produced and examined by counsel.

Objected to as incompetent, not being the best evidence.

Counsel for applicants then calls on Mills, Johnson & Co. to produce the originals of such letters, which are in their possession, and to put them in evidence.

Mr. Chase, appearing for Messrs. Matthews, Ramsey & Matthews, for the purpose of this examination only, says he has no knowledge of such originals, except as now stated by applicants' counsel, and that both Mills, Johnson & Co. and their said counsel are in Cincinnati, and that such demand to produce is not in season.)

Ans. 7. They are in Mr. Pike's own handwriting; he signing the firm-name to them; the same being written without conferring with me.

Int. 8. Were such letters sent to Mills, Johnson & Co. by mail, and do you believe they were duly received by them in the ordinary course of the mail?

Ans. 8. Yes; and answers received from them, under date of November 15 and 28th, 1870.

Int. 9. Please state whether there was a letter written in reply to that of the 21st of November, 1870, from S. N. Pike & Co., by Mills, Johnson & Co., a copy of which is in evidence as Exhibit No. 9.

(Same objection as last above.)

(Applicants' counsel desires it noted that he agreed in Cincin-
151 nati to permit Mills, Johnson & Co. to substitute copies for originals of all papers referred to in evidence, and asks that the same courtesy be extended to the applicants.)

Ans. 9. Yes, under date of November 28, 1870. This Exhibit No. 9 is a true copy of the same.

Int. 10. Will you please produce such letter; also letter from Mills, Johnson & Co., which is a reply to S. N. Pike & Co.'s of November 11?

Ans. 10. This is the original, under date of the 18th of November, 1870, by Mills, Johnson & Co. to us, in answer to Mr. Pike's letter of the 11th of the same month. I will produce the other, if possible. The Exhibit 9, however, is a correct copy.

(Paper produced, and marked Exhibit 14, for identification, Nov. 18, 1873, S. T. S., N. P.)

Int. 11. Charles L. Moore testifies that about the 30th of January, 1869, he visited New York, and during that visit he had an interview with S. N. Pike and yourself, at the request of Mills, Johnson & Co., respecting the use of these trade marks and brands by your then firm of S. N. Pike & Co. State whether there was any such interview at that time or at any other time.

(Objected to.)

Ans. 11. Not at all agreeing with his statements, his business being to solicit employment in our house, as he said he was going to leave Mills, Johnson & Co. There were no such demands made by him in behalf of Mills, Johnson & Co. in my presence. If I remember rightly, he said Mills, Johnson & Co. made claims to the ownership of the brands, which I considered a joke, and I think Mr. Pike did also.

Adjourned to November 19, at 10 a. m., at same place.

NOVEMBER 19, 1873, 10 *o'clock a. m.*

Met pursuant to adjournment; parties present as before.

Adjourned by consent of parties to November 22, at 11 o'clock a. m.

152 NOVEMBER 22, 11 *o'clock a. m.*

Met pursuant to adjournment; parties present by counsel as before.

Examination of GEORGE W. KIDD resumed:

Int. 12. Mr. Moore testifies, in his answer to 3d interrogatory, that Mr. Pike said it was true that he had sold these brands for a valuable consideration, and he thought Mills, Johnson & Co. were right in their demand that their use should be discontinued by the New York house of S. N. Pike & Co. Did Mr. S. N. Pike make any such statement?

(Registrants' counsel objects to statement of testimony, and as leading.)

Ans. 12. He did not in my presence, nor could not have said so to Mr. Moore without positively contradicting remarks he made to me.

(All of the answer after the word presence is objected to by registrants' counsel as argumentative and as hearsay.)

Int. 13. Mr. Moore testifies that you objected, as you had no part of the consideration of that sale, that you would do as you pleased as to their use. Did such conversation take place, and did you act independently of Mr. Pike or in opposition to him respecting the use of the trade-marks and brands by yourselves as a firm?

(Same objection.)

Ans. 13. I objected in every respect to any claims on the part of Mills, Johnson & Co. to the brands in question; I may have likely said so; in some respects I did act independently of Mr. Pike and in opposition to him, the business being managed by myself and Mr. Bristow. At that time I did not know the nature and exact condition of Mr. Pike's and Mills, Johnson & Co.'s understanding; I think Mr. Pike arranged with Mr. Moore to divide territory, but I was not a party to it. In courtesy to Mr. Pike, then, I did not take legal proceedings. Mr. Pike being now dead, so is my courtesy dead.

153 Int. 14. Did you acquiesce in the passing of any right or license or permission to use the brands in question from S. N. Pike to Mills, Johnson & Co.?

(Objected to.)

Ans. 14. I did not.

Int. 15. Did Mr. S. N. Pike ever state, or give you to understand in any way, that he had told Mills, Johnson & Co. that he was going out of the business in a year's time, and that then they would have the exclusive use of the brands in question?

(Objected to as hearsay, immaterial, and incompetent.)

Ans. 15. He did not. On the contrary, he ridiculed their absurd claims.

Int. 16. Did he, in the fall of 1868, at or about the time of the sale to Mills, Johnson & Co., have any intention, to your knowledge, of going out of the business in a year from that time?

(Objected to as incompetent.)

Ans. 16. He did not. He never intimated to me such an intention.

Int. 17. If he had had such an intention, would you or not have been likely to have known of it?

(Objected to.)

Ans. 17. Yes.

Int. 18. Were your relations with him sufficiently intimate and cordial to admit of his speaking to you of his business arrangements for the future, and did he or not make you acquainted with them, if he had any?

(Objected to as improper and immaterial.)

Ans. 18. Yes. My relationships with him were of the most friendly nature; so much so that our dealings together extended to extensive operations in real estate and other transactions outside of the business.

Int. 19. Mr. Moore testifies that, so far as his agency was concerned, a temporary arrangement was made by your agreeing not to sell the brands named west of Buffalo, N. Y. Now, state if this or what temporary arrangement was made at that time, if any.

154 Ans. 19. Mr. Moore made no arrangements with me, but, as I before testified, had an understanding with Mr. Pike personally. I think Mr. Pike at that time arranged that Mills, Johnson & Co. should not sell east of Buffalo, and he, in courtesy to them, I understood, promised not to sell west of Buffalo. I did not live up to it. Regardless of his arrangements, I sold west of Buffalo.

Int. 20. Were you a party to, or did you recognize, any arrangement made by Mr. Pike personally, and not made in the firm-name of S. N. Pike & Co.?

(Objected to.)

Ans. 20. I was not a party to any transaction he made personally with Mills, Johnson & Co. or their agents. I did not recognize any such arrangement he may have made directly or indirectly.

Int. 21. Mr. Moore testifies, in answer to the sixth question, that Mr. Pike, in that conversation, did not deny that Mills, Johnson & Co. had the rights which he, Moore, stated to Pike and yourself that they claimed, but rather acquiesced in them. Is that the fact?

(Objected to as leading.)

Ans. 21. No.

Int. 22. Did Mills, Johnson & Co. continue to sell east of Buffalo after that visit of Mr. Moore to New York?

Ans 22. I understood they did not.

Int. 23. State if Mr. Moore was employed by your firm of S. N. Pike

& Co., and whether he was discharged by that firm, or left of his own accord, and please state the circumstances of his leaving.

(Objected to as immaterial.)

Ans. 23. According to our books, Mr. Moore came into our employ as travelling agent, May, 1869, and was discharged for irregularities, incompetency, and continual drunkenness about the following January, having on one or two occasions in our office slight attacks of delirium tremens. Upon learning his previous character, we were informed that he had been for some time a very dissipated man.

155 Int. 24. Mills, Johnson & Co., in their letter which is marked Exhibit 10 in this case (originally marked Exhibit 13 for identification), state that a firm in Cincinnati was authorized by S. N. Pike & Co. to use one of their most valued brands, and had actually commenced to do so; that they had been assured, however, and did not doubt, such was without the personal knowledge or approval of Mr. Pike. State whether such was done without Mr. Pike's personal knowledge or approval.

Ans. 24. The agency and its business connected with us was conducted under Mr. Pike's knowledge, and nothing done by it but what was known by Mr. Pike personally.

Int. 25. Did S. N. Pike at any time acquiesce or acknowledge that Mills, Johnson & Co. had any exclusive right to the use of these brands in question, or anything more than the personal privilege that he extended to them and their successors at the time that he sold to them his Cincinnati property?

(Objected to.)

Ans. 25. He did not.

Int. 26. Had you knowledge of the arrangement made with Mills, Johnson & Co. through the intervention of J. Tilney, as appears by letter Exhibit 12 in this case?

Ans. 26. Yes.

Int. 27. Did Mills, Johnson & Co. and the firm of S. N. Pike & Co. adopt said arrangement?

Ans. 27. I understood that Mills, Johnson & Co. did, but we did not.

And in answer to questions proposed by Ph. Chase, esq., counsel for Mills, Johnson & Co., by way of cross-examination, the witness testifies as follows:

X Int. 28. When did you first have knowledge of Mr. Tilney's letter, Exhibit 12?

Ans. 28. About the time it was written.

X Int. 29. Did you see the copy of this letter, and if yea, who showed it to you, and where?

156 Ans. 29. I think not; the conversation as indicated in the letter was between Mr. Tilney and Mr. Pike.

X Int. 30. Did you hear such conversation?

Ans. 30. I may have heard of such conversation subsequent to such conversation between Messrs. Pike and Tilney, but did not hear the conversation itself.

X Int. 31. When did you first have knowledge of the arrangement indicated by Mr. Tilney's letter, and who informed you, and where?

Ans. 31. About the date of the letter; I don't remember who informed me, nor where.

X Int. 32. What was Mr. Tilney's relation to the firm of S. N. Pike & Co. at the date of such letter?

Ans. 32. He had no connection with the firm at the time, but had in

our outside operations with Mr. Pike and myself, his action in this matter being, as I understood, out of kindness to Mr. Pike.

X Int. 33. Did you ever complain to Mr. Tilney of his writing the letter?

Ans. 33. No.

X Int. 34. Did you ever write Mills, Johnson & Co. that you did not consent to the arrangement proposed in Mr. Tilney's letter?

(Objected to as immaterial.)

Ans. 34. I did not. I had no control over Mr. Pike in his transactions with Mills, Johnson & Co., except by legal process, which I then did not consider it wise to take.

X Int. 35. Why did you not then think it wise to take legal process?

Ans. 35. I preferred our term of copartnership should expire first, and that is my reason.

X Int. 36. Do you mean that you intended to reserve any cause of action you had or might have against Mr. Pike for making the arrangement made in the Tilney letter until after the expiration of your partnership with Mr. Pike?

(Objected to as immaterial.)

157 Ans. 36. No. The Tilney letter would not cause me to take legal process, the damages I sustained being in Mr. Pike giving license to Mills, Johnson & Co. for the use of property we jointly owned, for which I intended to take legal measures.

X Int. 37. Did you ever inform Mr. Pike that you intended to take legal measures against him for giving such license to Mills, Johnson & Co.?

(Same objection.)

Ans. 37. No. My purposes were to sue Mills, Johnson & Co., as we are now doing, and, failing in recovering our rights, to recur on Mr. Pike.

X Int. 38. Did you ever inform Mr. Pike of such purpose?

(Same objection.)

Ans. 38. No.

X Int. 39. Did you ever, during the lifetime of Mr. Pike, inform Mills, Johnson & Co. that you intended to take legal measures against them on account of their using such license, as you call it, from Mr. Pike?

(Same objection.)

Ans. 39. No.

X Int. 40. Did you inform them that you objected to their using such license from Mr. Pike, as you call it, that is, to use such brands west of Buffalo?

(Same objection.)

Ans. 40. I think not; I had no intercourse with them at all.

X Int. 41. You have stated that you knew that the arrangement made by the Tilney letter was carried out on the part of Mills, Johnson & Co. Did you inform them you were not carrying out the arrangement on your part?

(Same objection.)

Ans. 41. You are mistaken. I did not state that I knew, but that I understood, they were carrying out their understanding with Mr. Pike and Mr. Tilney. I did not inform Mills, Johnson & Co. that we

158 were not carrying out the arrangement, nor have any intercourse with them.

Adjourned by consent of parties to Tuesday, November 25, at 12 o'clock m., at the same place.

NOVEMBER 25, 12 *o'clock, m.*

Met pursuant to adjournment; present parties by counsel as before.

Examination of GEORGE W. KIDD resumed.

X Int. 42. Why did you not inform Mills, Johnson & Co. that you were not living up to the arrangement made by the Tilney letter of December 19, 1872?

Ans. 42. Because the trade-mark in question was ours, and I did not respect any privileges they might have availed themselves of, unless I was a party to giving it.

(Same objection.)

X Int. 43. Why, then, did you not compel Mr. Pike to revoke the arrangement made with Mills, Johnson & Co. by the Tilney letter?

(Same objections.)

Ans. 43. I have already answered that by saying that I preferred to wait till the expiration of our partnership.

X Int. 44. Did you take any steps whatever to require Mr. Pike to revoke the Tilney letter arrangement?

(Same objections.)

Ans. 44. None whatever.

X Int. 45. What do you mean by your answer to the 37th cross-interrogatory in stating that your purposes were to sue Mills, Johnson & Co., as you are now doing?

(Objected to, as the answer to that interrogatory sufficiently explains the witness's meaning, and as immaterial.)

159 Ans. 45. I regard this proceeding, which you are defending in the interests of Mills, Johnson & Co., a suit against them under the patent laws of the United States.

X Int. 46. Have you commenced any suit or action in any court against said Mills, Johnson & Co. on account of said trade-marks?

(Objected to as immaterial.)

Ans. 46. None other than this for the present.

X Int. 47. Was not Mr. Johnson, of Mills, Johnson & Co., present at the taking of your first testimony in the matter of this application, in the city of New York, during the last of October and first of November, for nearly a week?

(Objected to as irrelevant and immaterial.)

Ans. 47. He was.

X Int. 48. Did you not then have opportunities to serve upon him any papers in any suit you desired to commence against them, Mills, Johnson & Co., in the city of New York, where you reside?

(Objected to as irrelevant and immaterial.)

Ans. 48. Yes; but this suit (I call it a suit) I regard necessary to determine first.

X Int. 49. Do you undertake to swear to all that was said at the conversation between Pike and Moore in regard to the right of Mills, Johnson & Co. to said brands?

Ans. 49. I have not the remotest idea what was said out of my presence; but I do swear that Moore does not tell the truth in asserting that Pike conceded to them, Mills, Johnson & Co., the rights he, Moore, stated Pike granted them.

(Registrants' counsel moves to strike out all of the last answer, beginning with the words "but I do undertake to swear," etc., as irresponsive, and that the witness insists upon stating matter about which he is not interrogated.)

X Int. 59. At how many conversations were you present between Pike and Moore in regard to said trade-marks?

Ans. 50. I do not remember of any formal interviews between us three parties in the matter.

160 X Int. 51. I did not ask you about formal interviews, but as to conversations concerning such trade-marks?

Ans. 51. Perhaps one casual conversation; but think Moore had his conversations with Pike when I was not present.

X Int. 52. When and where did the conversation between Moore and Pike take place at which you were present?

Ans. 52. Doubtless in our office; I don't remember when.

X Int. 53. State when as nearly as you can.

Ans. 53. When Moore sought employment with us.

X Int. 54. When was that?

Ans. 54. The early part of 1869, I think.

X Int. 55. Who was present at that conversation besides Pike, Moore, and yourself?

Ans. 55. I have only guessed that we three had an interview, and have no recollection of who was present or what transpired.

X Int. 56. Did you ever request Mr. Pike to let you see the agreement or bill of sale he had made to Mills, Johnson & Co.?

(Objected to as immaterial.)

Ans. 56. Yes; he gave it to me from recollection.

X Int. 57. When?

(Same objection.)

Ans. 57. I don't remember.

X Int. 58. When and by whom were you first informed that Moore and Pike had made an arrangement that Mills, Johnson & Co. should not sell said brands of whiskey east of Buffalo, and that he should not sell said brands west of Buffalo?

(Same objection.)

Ans. 58. I don't remember by whom, but learned of Pike's understanding with Moore, I think, shortly afterwards.

X Int. 59. Did Mr. Pike consult you at all in reference to this arrangement?

(Same objection.)

161 Ans. 59. Yes.

X Int. 60. Before or after such arrangement?

(Same objection.)

Ans. 60. I think before and after.

X Int. 61. Did you oppose Mr. Pike's making such arrangement?

(Same objection.)

Ans. 61. Yes.

X Int. 62. Did Pike's making this arrangement in opposition to you, as you say, disturb his and your intimate and very friendly social and business relations?

(Same objection.)

Ans. 62. No.

X Int. 63. Do you have any personal knowledge for what Mr. Moore was discharged by your firm?

Ans. 63. Yes.

X Int. 64. Did you ever make any charges against Mr. Moore until after he gave his testimony in this proceeding, and, if yea, when and to whom did you make such charges?

Ans. 64. I don't know what you mean by charges. Moore was a poor, worthless drunkard, and we discharged him, and have not mentioned

his name, to my recollection, since his discharge, except in this testimony.

X Int. 65. Did you ever state to any person before or after Moore left your service, and before this proceeding, either in words or effect, that Moore was a poor, worthless drunkard?

Ans. 65. No. I had always the kindest feelings for him, and pitied his condition. He was a wealthy man when I first knew him, or regarded so.

X Int. 66. When did you first discover that Moore was a poor, worthless drunkard?

Ans. 66. Very soon after his coming into our employ.

X Int. 67. How long did Moore continue in your service after such discovery?

Ans. 67. Perhaps two months.

X Int. 68. What was Moore's business while employed by your firm?

162 Ans. 68. Travelling agent, or, properly speaking, soliciting agent.

X Int. 69. What do you mean by irregularities, for which you say, together with drunkenness, he was discharged?

Ans. 69. His general bad habits, and our objection to his overdrawing his salary.

X Int. 70. What were those bad habits?

Ans. 70. Those customary with dissipated men.

X Int. 71. Can you state any more specifically?

Ans. 71. No.

X Int. 72. Do you mean anything more by irregularities, as the cause of Moore's discharge, than what you have stated?

Ans. 72. No.

X Int. 73. Do you undertake to swear what Mr. Pike did or did not acknowledge or admit with respect to said brands when you were not present?

(Objected to as immaterial.)

Ans. 73. I could not positively swear what he has done out of my presence; but I confidently believe that he was a truthful man, and would not have contradicted himself, as shown by his letters to Mills, Johnson & Co., in regard to the brands, copies of which letters are in evidence.

GEORGE W. KIDD.

No other testimony being offered, the examination was then closed.

SAM. TRO. SMITH,
Notary Public, New York County.

163 Before the Commissioner of Patents.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," and application of George W. Kidd & Co.

Also,

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "Dave Jones, Paris, Ky., Bourbon," and application of George W. Kidd & Co. for registration of same.

SIRS: Please take notice that on Friday, the 14th day of November,

1873, at ten o'clock in the forenoon of that day, at the office of A. J. Todd, esq., at 37 Park Row, in the city of New York, we shall proceed to take the testimony of George W. Kidd, of New York City, and others, as witnesses in our behalf, in rebuttal of testimony taken by you in these cases.

164 The examination will continue from day to day until completed.

You are invited to attend and cross-examine.

G. W. KIDD,
ISAAC BRISTOW,
Firm of Geo. W. Kidd & Co.,
By MUNN & CO.,
Attorneys.

Due service of the within notice admitted.

CHASE, BRISTOW & HOLT,
Counsel for M. J. & Co.

165 EXHIBIT A.—*Oct.* 27, *A. D.* 1873. *S. T. S., N. P.*

STATE OF NEW YORK,
City and County of New York, ss:

On this 9th day of March, A. D. 1869, before me, Edward H. Kent, a notary public duly commissioned and sworn, personally appeared John S. Kidd, who, being by me duly sworn, doth depose and say that he is the agent for and of Samuel N. Pike & Co., doing business in the county of New York as rectifiers, etc.; that the said Samuel N. Pike and George W. Kidd, the parties comprising the said firm of Samuel N. Pike & Co., are of the age of twenty-one and citizens of the United States; that the following names or trade-marks, viz:

No. 1. Cognac Brandy B. B.

No. 2. E. Phelps' Best Rye Gin, No. —, First Proof. Gull's Williamsburgh Point.

No. 3. Choice Monongahela Mountain Whiskey, Pennsylvania. W. & P.

No. 4. S. N. Pike's Double Distilled White Wheat Whiskey, Cincinnati, Ohio.

No. 5. Schwach & Smith's celebrated Continental Gin, Chicago.

No. 6. Ellicott's Rye Whiskey, Ellicott's Mills, Maryland.

No. 7. Morning Star Gin (with figure of star).

No. 8. J. H. & Son's Kentucky Bourbon Whiskey.

No. 9. Rye Monongahela Whiskey, from L. S. Miller, Pittsburgh, Pa.

No. 10. L. W. Brown's Laffel Bourbon Whiskey, Cynthiana, Ky.

No. 11. S. N. Pike's XXX Whiskey, Cincinnati, Ohio.

No. 12. Copper-distilled S. N. Pike's Celebrated Magnolia Whiskey.

No. 13. S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio.

No. 14. Copper-distilled A. B. Brown's Clover-Leaf Whiskey, Brownsville, Pa.

166 No. 15. Copper-distilled A. B. Brown's Tulip Whiskey, Brownsville, Pa.

No. 16. Copper-distilled A. B. Brown's Primrose Whiskey, Brownsville, Pa.

No. 17. Gin (with figure of a swan).

No. 18. J. Fish & Bro., 1860, a Sage Grove Distillery, Ky., Fayette Co.

are used by the said firm to designate and mark certain brands and samples of their manufacture; that the said trade-marks are not in use by any other person or persons to the said firm or this deponent known; and the said firm, by the said agent, hereby claim the protection of law in the use thereof.

JOHN S. KIDD.

Sworn to before me this 9th day of March, 1869.

E. H. KENT,
Notary Public, N. Y. Co.

(Endorsed:) Filed March 9, 1869.

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original trade-mark of S. N. Pike's Magnolia Whiskey on file in my office, and that the same is a correct transcript therefrom, and of the part of such original.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 27th day of October, 1873.

[L. S.] CHAS. E. LOEW, *Clerk.*

167

S. N.

PIKE'S

Magnolia

WHISKEY,

Cincinnati,

OHIO.

168 *Exhibit B.—Oct. 27, A. D. 1873. S. T. S., N. P.*

STATE OF NEW YORK,
City and County of New York, ss:

I, John S. Kidd, agent for the firm of Samuel N. Pike & Co., liquor rectifiers, doing business within this State and county of New York, being duly sworn, doth depose and say that the annexed trade-mark, bearing the words following, viz.: "Dave Jones, Paris, Ky., Bourbon," the same to be branded upon their barrels, and other boxes, vases, or casks, etc., wherein to convey, transfer, and set over a certain brand of Bourbon, to be known and designated by the name of Dave Jones; that the same is not in use by any other person or persons to this deponent known; and the said deponent, as agent, hereby prays that they may be protected in their use of the same.

JOHN S. KIDD.

Sworn to before me this 24th February, A. D. 1869.

E. H. KENT,
Notary Public.

(Endorsed:) Filed 24th February, 1869.

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original trade-mark of "Dave Jones, Paris, Ky., Bourbon" on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 27th day of October, 1873.

[L. S.] CHAS. E. LOEW, *Clerk.*

103

DAVE JONES

PARIS, KY.,

BOURBON.

170 *Exhibit C.—Oct. 30, A. D. 1873. S. T. S., N. P.*

Memorandum of a partnership agreement made and entered into this day of , A. D. 1873, by and between George W. Kidd, of the city of New York, of the first part, and Isaac Bristow, of the city of Brooklyn, of the second part, in consideration of the mutual promises and agreements herein contained, witnesseth:

First. The parties above named hereby become partners for the purpose of carrying on the business of rectifiers, distillers, and wholesale dealers in spirits and whiskeys in the city of New York, under the name, style, and firm of G. W. Kidd & Company, for the period of five years from this date to the day of , eighteen hundred and seventy-eight.

Second. The said George W. Kidd shall contribute as his share of the capital the amount which he has to his credit as his share of the capital on the books of the late firm of S. N. Pike & Company, of which both the parties hereto were members; and, in addition thereto, such other sum as he, the said Kidd, may be able to retain of the capital and funds due to Samuel N. Pike, the senior member of said last-named firm, by arrangement with the executors of his last will and testament, or by arrangement with his widow, Mrs. Ellen M. Pike, and his next of kin, all or any, or either of them; and the said Bristow shall contribute as his share of the capital the amount which he has to his credit on the books of the said late firm of S. N. Pike & Company.

Third. Each of the said parties hereto shall be entitled to interest on the amount of capital contributed by them respectively, which shall be credited and paid to each of them respectively, and charged as expense yearly upon the books of the partnership hereby formed.

171 Fourth. The said Kidd shall be entitled to eleven-sixteenths of the profits made, and shall bear eleven sixteenths of the losses incurred, in the business of the partnership; and the said Bristow shall be entitled to five-sixteenths of the profits made, and shall bear five-sixteenths of the losses incurred, in the business of the said partnership.

Fifth. The said Kidd shall be entitled to draw from the funds of the partnership, in monthly payments, the sum of dollars per annum, and the same shall be charged to him on its books; and the said Bristow shall be entitled to draw from the funds of the partnership, in monthly payments, the sum of dollars per annum, and the same shall be charged to him on its books.

Sixth. In case the share of the profits of each of the partners shall exceed the sum which each of them is entitled to draw as aforesaid, such excess shall in each case be credited to each as capital, and shall be left in the concern until the expiration or other sooner determination of the partnership, and each shall be entitled to interest thereon.

Seventh. (Here insert clause about repayment by Mr. Kidd of capital due estate S. N. P.)

Eighth. At the expiration or other sooner determination of the partnership, after the payment of its debts and liabilities, if any then exist, each of the said partners shall be paid the amount of capital then standing to his credit before any division is made between them; and in case the property, assets, and effects of the concern shall be insufficient to pay the said capital in full, each shall be paid pro rata.

Ninth. Accurate books of account of the affairs, dealings, and transactions of the partnership shall be kept; they shall at all times be accessible to the inspection of each partner, and shall be written up and

balanced every months, and an inventory shall also be made every months.

172 Tenth. Each of the said partners shall devote his whole time and attention to the transaction of the business of the partnership during the continuance thereof.

Eleventh. Neither of the said partners shall make, draw, sign, endorse, or execute any promissory note, acceptance, bond, undertaking, or obligation whatever, in the name of the firm, it being understood that all purchases are intended to be and shall be made for cash; and in order to depart from this covenant, the written consent of both parties shall be necessary, and shall be first obtained in each case. And it is further agreed that neither of them shall use the funds of the partnership or any part thereof, or incur any obligation or liability whatever in its name, except in the legitimate and regular business thereof.

173 *Exhibit D.—Oct.* 30, 1873. *S. T. S., N. P.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that on the ninth day of February, A. D. 1870, Samuel N. Pike & Co., of the said district, have deposited in this office the title of a print, the title of which is in the words following, to wit, "Dave Jones, Paris, Ky., Rye," the right whereof they claim as proprietors, in conformity with an act of Congress entitled "An act to amend the several acts respecting copyrights."

GEO. F. BETTS,
Clerk of the District.

Work deposited this day of 1873.

I, A. R. Spofford, Librarian of Congress, hereby certify that the within is a true copy of the original record of copyright in the Library of Congress.

In witness whereof I have hereunto set my hand and affixed the seal of my office this 29th day of October, 1873.

[SEAL.]

A. R. SPOFFORD,
Librarian of Congress.

174 *Exhibit E.—November* 4, 1873. *S. T. S., N. P.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that on the twenty-third day of April, A. D. 1869, Samuel N. Pike & Co., of the said district, have deposited in this office the title of a print, the title of which is in the words following, to wit, "Caution, Dave Jones, Paris, Ky., Bourbon," the right whereof they claim as proprietors, in conformity with an act of Congress entitled, "An act to amend the several acts respecting copyrights."

GEO. F. BETTS,
Clerk of the Southern District of New York.

Work deposited this day of 1873.

I, A. R. Spofford, Librarian of Congress, hereby certify that the within is a true copy of the original record of copyright in the Library of Congress.

In witness whereof I have hereto set my hand and affixed the seal of my office this 3d day of November, 1873.

[L. S.]

A. R. SPOFFORD,
Librarian of Congress.

175 *Exhibit* 11.

NEW YORK, *Nov.* 11, 1870.

Messrs. MILLS, JOHNSON & CO.:

DEAR SIRS: We understand you are using an exact copy of the enclosed with your signature on the Dave Jones brand of whiskey; this is an infringement which we cannot permit, as you have no right to use it. Mr. Pike did not have this addition when he gave you the use of his brands; we therefore insist that you desist using the same on the Dave Jones p'k'gs.

Yours truly,
(Signed) SAMUEL N. PIKE & CO.

Exhibit 13.—*For identification, Nov.* 18, 1873, *S. T. S., N. P.*

CINCINNATI, *Nov.* 18, 1870.

Messrs. SAM'L N. PIKE & Co., *New York:*

GENTLEMEN: Your favor of Nov. 11 has been at hand some days. The circumstances which have led to this correspondence make it proper that we should come at once to a complete and definite understanding of our mutual rights and relations. We therefore now take occasion to submit our view of them.

On the 1st day of October, 1868, we completed the purchase from Mr. Pike of his business in this city, including all his brands. The bill of sale given to us by Mr. Pike, in writing, gives us the sole and exclusive title to all of these brands, and this right we could maintain if we chose to do so. We admit, however, that there was a verbal understanding with Mr. Pike that he should have the right to continue in business in New York one year, and during that time he should be entitled to the joint use of these brands. This period has elapsed, and Mr. Pike has not retired from business, and still continues the use of our brands. In addition to this, we were made aware of the fact that about one
176 year ago, a firm in this city was authorized by you to use one of our most valued brands, and had actually commenced to do so. This, however, we have been assured, and do not doubt, was without the personal knowledge or approval of Mr. Pike. Our attention is next called to the fact that Mr. Pike's name, the firm name of your house in New York, and the name of the firm whose business and good-will we purchased, as before stated, has been placed upon a store-house in this city, on Burnet street, between Walnut and Vine streets, and has remained there during one year, and is there now.

Following these open violations of our rights is an attempt, not merely to continue the use of one of our brands, the "Dave Jones," but to obtain the exclusive use of it by means of an addition to it; and we are threatened with legal proceedings for attempting to protect ourselves in the use of our own brand.

In view of these events, we feel called upon to say that, having paid a large amount of money in consideration of the transfer to us of the brands and good will of S. N. Pike & Co., we must now insist that the contract with us shall be fulfilled in the following respects: We insist,

1st, that the sign bearing the name of S. N. Pike & Co., before referred to, shall be immediately taken down, and that this name shall not be employed in business of a similar character in this city or elsewhere outside of New York City. 2d. We insist that the addition to the "Dave Jones" brand, before referred to, shall not be further used. This brand is only used by yourselves and the writers; if other persons attempt to use it, the law will afford ample protection against them; and your use of this addition is simply an attempt, as we before stated, to prevent us from the beneficial use and enjoyment of our own property.

In making these requirements, without requiring also that you shall totally discontinue the use of Mr. Pike's name and these brands, we wish it to be distinctly understood that we do not give our consent to the continuance of that use, or waive our right to compel the dis-
177 use of the same whenever we shall choose to do so. We do not desire litigation, especially with Mr. Pike, with whom we desire and hope to maintain cordial relations; but we will insist upon the above conditions.

We have taken the opinion of counsel upon the questions at issue between us, and the views now presented are fully justified by them.

We are, gentlemen, very respectfully yours,

MILLS, JOHNSON & CO.

Exhibit 8.

CINCINNATI, *Nov.* 21, 1870.

Messrs. MILLS, JOHNSON & CO.:

DEAR SIRS: Your favor of the 18th inst. just to hand. We send you an abstract of the agreement with you and Mr. Pike, which is short and simple, and easily understood:

"Having sold to Messrs. Mills, Johnson & Co., my premises, No. 18 and 20 Sycamore street, I hereby extend to them the use of all my brands formerly used by me in my Cincinnati house."

Mr. Pike denies having any verbal or any understanding whatever with you outside of the above; we therefor reiterate the language of our last respects to you with reference to the card enclosed to you, with the hope you will not use the copyright added to the Dave Jones brand; we also claim that we can establish ourselves anywhere in business if we are desirous of doing so, but would not care unless forced to it through your own misconception of your interest.

Yours truly,

(Signed) SAMUEL N. PIKE & CO.

178 *Exhibit* 9.

CINCINNATI, *Nov.* 28, 1870.

S. N. P. & Co., *New York:*

In reply to yours of the 21st inst., we have merely to repeat what we said in ours of the 18th inst., and are determined to stand upon our rights, as we then state them. We are sincerely desirous, however, of a better understanding between us on the subject; and if you can suggest any amicable arrangements which will definitely settle the present controversy, and be likely to establish permanently such relations between us as will not be disturbed by further misunderstandings, we shall be glad to hear from you.

(Signed) MILLS, JOHNSON & CO.

Exhibit 12.

NEW YORK, *Dec.* 19, 1870.

Messrs. MILLS, JOHNSON & Co.:

DEAR SIRS: I have had a conversation with Mr. Pike on the matter in controversy between you, and his proposal is that you will agree not to sell the Dave Jones brand of whiskey in "New York and the New England States, and they (S. N. P. & Co.), while in business in New York, will engage not to sell the Magnolia brand of whiskey in Southwestern States"; the New England States including and being Maine, New Hampshire, Vermont, Rhode Island, Connecticut, and Massachusetts, and the Southwestern States being and including Louisiana, Texas, Mississippi, Alabama, Missouri, and Tennessee.

It seems to me that an understanding like this is equally fair to both parties, and, lived up to in good faith by both, will prevent further misunderstandings between you; and in that spirit I recommend it to you. Money matters are tight here, and will probably remain so till after New Year's; should you require any after that, you might write me.

Yours truly,
(Signed) J. TILNEY.

179 P.—*Filed & offered Dec'r* 27, 1877. *F. B. Vinot, dy cl'k.*

8008.

180 TRADE-MARK INTERFERENCE.

(Two cases.)

GEO. W. KIDD & Co. }
against
MILLS, JOHNSON & Co. }

"Dave Jones" and "Magnolia" brands.

Testimony in behalf of Mills, Johnson & Co.

Before the Commissioner of Patents.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "Dave Jones, Paris, Ky., Bourbon," and application of Geo. W. Kidd & Co. for registration of same.

SIRS: Please take notice that on Thursday, November 6, 1873, at 10 o'clock in the forenoon, at the office of Matthews, Ramsey & Matthews, at No. 58 West Third street, in the city of Cincinnati, State of Ohio, we shall proceed to take the testimony of Joseph F. Mills, Charles L. Mills, W. W. Johnson, William R. Williams, Mr. Swatzenberg, and others, as witnesses in our behalf.

181 The examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated New York, October 30, 1873.

MILLS, JOHNSON & CO.,
By CHASE, BESTOW & HOLT,
Attorneys.

To GEO. W. KIDD & Co.

Before the Commissioner of Patents.

In the matter of the interference between the registered trade-mark of Mills, Johnson & Co., consisting of "S. N. Pike, Magnolia whisky, Cincinnati, Ohio," and application of Geo. W. Kidd & Co.

SIRS: Please take notice that on Thursday, November 6, 1873, at 10 o'clock in the forenoon, at the office of Matthews, Ramsey & Matthews, at No. 58 West Third street, in the city of Cincinnati, State of Ohio, we shall proceed to take the testimony of Joseph F. Mills, Charles L. Mills, W. W. Johnson, William R. Williams, Mr. Swatzenberg, and others, as witnesses in our behalf.

The examination will continue from day to day until completed. You are invited to attend and cross-examine.

Dated New York, October 30, 1873.

MILLS, JOHNSON & CO.,
By CHASE, BESTOW & HOLT,
Attorneys.

To GEO. W. KIDD & CO.

182 Depositions of sundry witnesses taken before me, a notary public within and for the county of Hamilton and State of Ohio, on the 6th day of November, 1873, between the hours of 8 a. m. and 6 p. m., at the office of Matthews, Ramsey & Matthews, No. 58 West Third street, in Cincinnati, in said county, pursuant to the annexed notices, to be read in evidence on behalf of Mills, Johnson & Co. in the cases pending before the Commissioner of Patents, in the matter of the interference between the registered trade-marks of Mills, Johnson & Co., consisting of "S. N. Pike, Magnolia Whisky, Cincinnati, Ohio," and of "Dave Jones, Paris, Ky., Bourbon," and the application of George W. Kidd & Co. for registration of the same.

MOSES H. SCHWARZENBERG, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, deposeth and saith as follows:

Q. 1. Please state your name, age, residence, and occupation.

A. My name is Moses H. Schwarzenberg; my age is forty-three; I live in the city of Cincinnati; my occupation is that of traveling agent for Mills, Johnson & Co., for the last three years.

Q. 2. State whether or not you were connected with them in any other capacity previous to that time.

A. I was not.

Q. 3. State if you were acquainted with the late Samuel N. Pike, and if you had at any time any conversation with him touching the use of the brands "Dave Jones" and "Magnolia." State when and where such conversation or conversations took place, all the circum-
183 stances connected therewith, and all that was said by or to Mr. Pike.

(Conversations between the witness and Mr. Pike objected to as incompetent, and also as immaterial, so far as the rights of the applicants are concerned, and as hearsay too general and indefinite.)

A. I was acquainted with him; have been for the last fifteen years. Having a large trade East on the brand of "Dave Jones," I found that parties in Philadelphia had purchased the imitative "Dave Jones" of a house in this city—Freiburg & Workum. I reported the matter home to my house. At the solicitation of Mr. Johnson, of the firm of Mills,

Johnson & Co., I went to see S. N. Pike in the spring of last year (1872), at his place of business on Broad street, New York, asking him, while this was near his home, to stop the sale of this imitative "Dave Jones" at Philadelphia, sold by Freiburg & Workum here, naming, at the same time, the house of Roskamp, Gastley & Co., at Philadelphia, thinking that he (Mr. Pike) might stop the sale. Mr. Pike (S. N. Pike) at that time answered me that the brand of "Dave Jones" belonged to Mills, Johnson & Co., of Cincinnati, and that they were the proper parties to stop such sales. I m ntioned "Magnolia" at that time, and Mr. Pike says he would have nothing to do with it. My principal object was to stop that "Dave Jones" sale. This was the only conversation I ever had with him on the subject.

Cross-examination:

Cross Q. 4. Was the house of Freiburg & Workum, of this city (Cincinnati), then, at that time, selling the "Magnolia" brand to Roskamp, Gastley & Co., of Philadelphia?

A. Not to my knowledge.

184 Cross Q. 5. Why, then, did you refer to it, in connection with the "Dave Jones" sale in Philadelphia, on the visit to S. N. Pike, as stated by you?

A. Because I saw "Magnolia" in Albany, New York, and it was not from Mills, Johnson & Co., of Cincinnati, and did not think that anybody but Mills, Johnson & Co. had a right to sell it.

(Last clause of answer objected to as volunteer and incompetent, being the witness' conclusion.)

Cross Q. 6. State, if you please, from whom was this "Magnolia" whisky which you saw in Albany.

A. The parties would not tell me.

Cross Q. 7. Would you swear that you believed it was from Freiberg & Workum, of Cincinnati?

A. No, sir.

Cross Q. 8. Are you not of the belief that it was from S. N. Pike & Co., of New York?

A. I can't tell. I think it might be.

Cross Q. 9. Did you not ask Mr. S. N. Pike, as soon as you arrived in New York from Albany, during the conversation, if his firm had sold and sent any "Magnolia" whisky to Albany?

A. I did not ask the question.

Cross Q. 10. Give the name of the firm where you saw that "Magnolia" whisky in Albany.

A. I could not tell you. If I had my book here I could.

Cross Q. 11. Please obtain from your book, or bring your book here in the morning and give us such information.

A. I will do so.

Cross Q. 12. Give the date in the spring of 1872 when such conversation with S. N. Pike took place.

185 A. I couldn't tell the day exactly. I got a memorandum where I can refresh my memory, and will tell you to morrow.

Cross Q. 13. Who was present at that conversation?

A. Nobody but Pike and myself, at his back office.

Cross Q. 14. Do you mean to say that neither of his partners were present at that conversation?

A. I do.

Cross Q. 15. Did you solicit a private interview with him?

A. I was always welcome, and treated very courteously.

Cross Q. 16. Question repeated.

A. No. I did not ask any private conversation.

Cross Q. 17. Who did you see that day in his office, besides himself, that you know?

A. I saw a young Kidd there, in the outside office; also Mr. Bristow; I think it was him; I think that was his name. He was in the front office sitting at his desk.

Cross Q. 18. Are and were you acquainted with Mr. Bristow?

A. Not personally.

Cross Q. 19. Then how did you know this was Mr. Bristow?

A. I inferred from his appearance, as he has been described to me.

Cross Q. 20. When was he so described to you, so that you could so infer it?

A. On several occasions, years before and afterward. I was never introduced to him, but think I should know him if I should see him.

Cross Q. 21. For whom had you a large trade East?

186 A. For Mills, Johnson & Co.

Cross Q. 22. How long did that conversation continue?

A. About a half an hour in all. It may be less; I can't tell exactly.

Cross Q. 23. How often were you in the habit of calling on Mr. Pike?

A. Almost every time I was in the East; I am East about five times a year.

Cross Q. 24. Do you mean to swear that you have given Mr. S. N. Pike's exact language, or his words used in conversation with you on that occasion when referring to the "Dave Jones" and "Magnolia" brands?

A. I do, in regard to the "Dave Jones" matter, and do think that the expression on the "Magnolia" was about as I stated.

Cross Q. 25. How are you able to give Mr. S. N. Pike's exact words as to the "Dave Jones" used in the conversation, nearly two years ago, when you cannot give his exact words respecting the "Magnolia" brand?

A. For the simple reason that the "Dave Jones" brand interested my whole trade East, and "Magnolia" I never cared to sell East.

Cross Q. 26. Do you get a commission on sales you effect in these brands?

A. Must I answer this question, as this is a private matter of my own?

Cross Q. 27. I do not wish to know the extent of your commissions, but if you received a commission on the amount of whisky sold under these brands. Will you answer it?

A. I did not get any then, nor do I get any now.

187 Cross Q. 28. Did you not get a commission on sales effected, or orders taken?

A. No, sir.

Cross Q. 29. How then were you interested in the sale of "Dave Jones" brand of whisky East?

A. If my house pays me a salary, it is my duty to see their interests guarded, for their interest is mine the moment I go into their employ.

Cross Q. 30. Then you mean to swear that you never received any commission or commissions, do you?

A. I am a paid agent, working on a salary.

Cross Q. 31. Question repeated.

A. No, sir.

Cross Q. 32. Are you not a German, and is it that you do not understand English very well?

A. I am a German, and I am fully capable of the English language, also French and Hebrew.

Cross Q. 33. Did you not say just before I put the last question that you were a German, and that you did not understand English very well?

A. I told you that I understood English well.

Cross Q. 34. Give me a direct answer to the last question, yes or no.

A. I did not. I wanted to explain the meaning of your question 27.

Cross Q. 35. Why did you want the meaning of question 27 explained, if you understood English very well?

A. Because I wanted you to define me the difference between commission and salary.

188 Cross Q. 36. Then if you were working for your house on a salary, why were you not as much interested in the stopping of the sale of the "Magnolia" as you were in the "Dave Jones" brand?

A. For three reasons: first, interest of my house; that's my first duty; second, I had no sale of "Magnolia"; third, the "Dave Jones" justifies a better profit.

Cross Q. 37. Did any other person than yourself sell these brands of whisky in the East for the house of Mills, Johnson & Co.?

A. Not in my territory.

Cross Q. 38. What was your territory?

A. Philadelphia, Baltimore, Richmond, Pittsburg, Wheeling; the States of Virginia, Pennsylvania, and Maryland. My principal trade is in those States.

Cross Q. 39. What took you then five times a year to New York, and to Albany probably?

A. I always go to New York. I get a through ticket to there, and have got friends there, and, up to last year, I nursed a trade in the States of New York, Connecticut, and Massachusetts.

Adjourned to 10 o'clock a. m. to-morrow, November 7, 1873.

E. L. DECAMP,
Notary Public.

Met pursuant to adjournment, at the same place, on the morning of November 7, 1873, at 10 o'clock, when the further taking of these depositions was proceeded with.

E. L. DECAMP,
Notary Public.

189 MOSES H. SCHWARZENBERG continued his testimony, and said:

The name of the firm in Albany where I found that "Magnolia" was John Erers, Albany, N. Y. It was on July 27, 1871. I got this by looking over my orders and referring to my letters wrote at that time.

Cross Q. 40. Have you that letter and will you produce?

A. I can't produce that letter on account of business which I don't want to go out or divulge. I don't want to expose my business.

Cross Q. 41. Give the date of the alleged conversation with S. N. Pike.

A. It was in the month of July, 1872.

Cross Q. 42. State particularly how you fix it?

A. By meeting certain persons at that time in New York City, customers of mine.

MOSES H. SCHWARZENBERG.

WM. R. WILLIAMSON, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, deposeth and saith as follows:

Q. 1. Please state your name, age, residence, and occupation.

A. My name is Wm. R. Williamson; my age is fifty-five; I reside in the 25th ward, Cincinnati; I am executor, resident here, of the estate of S. N. Pike, deceased; I am engaged in managing the estate of S. N. Pike, as one of the executors.

Q. 2. What business relation did you sustain to S. N. Pike, if any, during his lifetime, and when did it begin and end?

190 A. It was S. N. Pike & Co.; at first in collecting his rents and managing his affairs generally in Cincinnati. It began in March, 1864, and terminated at his death in December, 1872.

Q. 3. What business relation, if any, did you sustain to the firm of S. N. Pike & Co., and when did it begin and end?

A. Bookkeeper and financial general manager of office affairs. It began in October, 1864, and continued during its various changes until the Cincinnati house was sold out, in October, 1868.

Q. 4. State what business that house was engaged in in Cincinnati, and, in general terms, how extensive were its operations.

A. The wholesale liquor business; transactions large.

Q. 5. State who first composed that firm, and what changes took place in its membership, from time to time, giving the order and dates, as near as you can, of the changes.

A. Samuel N. Pike, Joseph Tilney, and George W. Kidd made the firm from October, 1864, to October, 1867. Samuel N. Pike and George W. Kidd made the firm from October, 1867, to October, 1869. A new arrangement was made between the same parties, and the business went on in New York. I think it was made for two years, but continued longer, by sufferance. A new arrangement was entered into in January, 1872, wherein Samuel N. Pike, George W. Kidd, and Isaac Bristow were the parties to the new firm, under the style of S. N. Pike & Co.; the same style; it was never altered, and terminated with Mr. Pike's death.

191 (Applicants' counsel objects to the last statement of the witness as incompetent, being a conclusion on his part; also his other statements, not being simple statements of fact, as incompetent.)

The witness further stated that the business was carried on in Cincinnati and New York by that firm—one concern, two houses—until the Cincinnati house was disposed of, when it was continued in New York.

Q. 6. State whether the original firm of S. N. Pike & Co. transacted business, from its beginning, in Cincinnati and New York, or in Cincinnati alone.

(Objected to as immaterial.)

A. It transacted business in both cities.

Q. 7. Where did the partners respectively reside?

A. At the formation of the partnership, in Cincinnati; subsequently, in New York—Kidd leaving immediately on the formation of the partnership, in October, 1864; Mr. Tilney as soon thereafter as he could close up his affairs here, and Mr. Pike following probably next year, if I recollect right, or the year thereafter.

Q. 8. Do you know whereabouts in New York the firm of S. N. Pike

& Co. opened their business in October, 1864, at the formation of the partnership?

A. I think in Fourteenth street was their distillery; the office down town. I don't know; I am not familiar with the streets of New York; probably in Cedar street; moving their office and salesroom from time to time.

Q. 9. Was the firm of S. N. Pike & Co. constituted by written articles of partnership? If so, can you produce the original or a copy thereof?

A. It was, and I have the original, and can produce it, and now do so.

(The witness here produces the articles of partnership, and, by consent of parties, a certified copy is prepared by the notary, to be used, as far as competent, instead of the original, and is now offered in evidence by counsel for Mills, Johnson & Co., being the paper hereto attached, and marked Exhibit 1.)

Q. 10. State what amount of capital was put into this partnership, respectively, by Tilney and Kidd.

(Objected to as immaterial.)

A. I do not know that I can state definitely, but it was whatever they had to their credit with Mr. Pike previously, and whatever amounts they chose to put in additionally, no definite amount being required.

Q. 11. What business had Mr. Pike been engaged in previously to the formation of this partnership in Cincinnati; and what relation in that business did Tilney & Kidd sustain to him, and for how long a time prior to its formation?

(Question objected to as immaterial.)

A. The same business, associated with others and on his own account, for many years previous. Mr. Tilney occupied the same position that I took till a few months before I commenced with Samuel N. Pike, leaving his situation to embark in business, in connection with Mr. Pike, in the opera-house, on Fourth street, Cincinnati—I believe a fancy grocery business. Mr. Tilney had been connected with Mr. Pike for twelve to fifteen years, if I have been correctly informed, in the relation of book-
keeper, and managing office affairs, financial matters, collecting
193 his rents, and attending to his private business. Mr. Kidd I found connected with Samuel N. Pike as clerk, attending to sales and distillery matters; how long he had been connected with the house I cannot say; it must have been for some years.

Q. 12. At the time of the formation of the firm of S. N. Pike & Co., in October, 1864, who was the owner of the real estate, fixtures, good-will, brands, and trade-marks subsequently used by the firm?

A. Samuel N. Pike.

Q. 13. At the time that firm was formed and organized, state whether an account of stock was taken; and, if so, what it embraced.

(Objected to as immaterial.)

A. It was taken, and embraced all the liquors on hand in its various shapes, cooperage, coals, paints, essential oils, transfer of policies, with insurance on goods; office furniture, such as desks, letter-presses, etc., and anything found necessary in the manufacture of liquors that was on hand, such as berries, coloring matter, etc.

Q. 14. Whose property was this, and who received credit for it on the books of the firm?

(Objected to as immaterial.)

A. Samuel N. Pike.

Q. 15. State whether this account of stock embraced any brands or

trade-marks, or whether in any other form Mr. Pike received credit for any amount as the value of any such.

(First branch of question objected to as immaterial. Last branch as calling for a conclusion, and as incompetent; also too general and indefinite.)

194 A. According to my recollection, no brands or trade-marks were enumerated in the invoice. There was never any entry made in reference to any brands or trade-marks in the books of S. N. Pike & Co. to the credit of S. N. Pike.

Q. 16. State what settlement was made with Tilney, on his retiring from the firm in 1867, and whether it embraced any allowance to him for any supposed interest of his in the brands and trade-marks used by the firm, and originally belonging to Mr. Pike.

(Objected to as immaterial, and as calling for transactions between third parties, and as leading and argumentative.)

A. Mr. Tilney retired, taking his share of the profits, agreeable to the terms of the copartnership. No mention or account was made of brands or trade-marks in the settlement.

Q. 17. State whether or not, after Tilney's retirement, the new firm of S. N. Pike & Co., consisting of Pike and Kidd, continued business under new articles of partnership; if not, under what agreement did they continue business?

(Objected to as immaterial.)

A. They continued business under a new arrangement, the precise nature of which I have forgotten, although I had to do with the settlement of all these firms.

Q. 18. State whether, if you recollect, this new arrangement was in writing or verbal.

A. I think, verbal.

Q. 19. State whether the old books were closed and new ones opened.

(Objected to as immaterial.)

A. In 1867, yes. I am not clear as to a new set in 1869.

195 Q. 20. Was an account of stock taken after Tilney's (in 1867) retirement, for the purpose of opening new books?

(Objected to as immaterial.)

A. There was an account of stock taken to determine the amount of stock on hand.

Q. 21. State whether that account included any brands or trade-marks, or valuations of the same.

(Objected to as immaterial.)

A. My recollection is, no.

Q. 22. State when the firm of S. N. Pike & Co., as a house doing business in Cincinnati, was closed and how.

A. It was closed on October 1, 1868, the date on which the transfer was made to Mills, Johnson & Co. of Sycamore street property, and transfer of business to them.

Q. 23. Do you mean to be understood in your last answer as saying that the house of S. N. Pike & Co., doing business in Cincinnati, was closed by means of a sale of its property, business, and effects, and the distillery property of S. N. Pike to the firm of Mills, Johnson & Co.?

(Last clause of question objected to as leading and improper, as such is not proved to be the fact.)

A. I mean to say that the sale of the property belonging to S. N. Pike, on Sycamore street (where S. N. Pike & Co.'s business was located) closed the business house of Samuel N. Pike & Co. in Cincinnati.

Q. 24. To whom was that property sold at that time by S. N. Pike?

(Objected to as immaterial.)

A. Joseph F. Mills, W. W. Johnson, and Charles L. Mills, I think, were the parties to whom the property was deeded. I will add, these parties, at the time of purchasing, formed the firm of Mills, Johnson & Co.

196 Q. 25. What disposition, if any, was made at that time or soon after, by S. N. Pike & Co., of their property, effects, and business in Cincinnati?

(Objected to as immaterial and as answered.)

A. Most of the property was shipped to the New York house; some portions sold here; probably some portions went to fill orders in New York. I am not certain of this last disposition.

Q. 26. Do you know whether any portion of the stock or merchandise was purchased by Mills, Johnson & Co., either from S. N. Pike & Co. or S. N. Pike?

(Objected to as immaterial.)

A They did purchase a portion of the stock from S. N. Pike & Co., according to the best of my recollection. They purchased the fixtures from Samuel N. Pike.

Q. 27. State whether, to your knowledge or in your presence, previous to the sale to Mills, Johnson & Co., and the winding up of the house of S. N. Pike & Co. in Cincinnati, Mr. Kidd ever made any claim of any interest in the brands or trade-marks used by the firm and previously used by S. N. Pike. If so, state when, and where, and in what terms such claim was made.

(Objected to as immaterial.)

A. I am not aware of any such claims having been mentioned or urged by Mr. Kidd.

Q. 28. What became of the good will of the business of the house of S. N. Pike & Co., in Cincinnati, upon the relinquishment of business by S. N. Pike & Co. in that city?

(Objected to as immaterial.)

197 A. As I said before, the sale of the property was made by S. N. Pike. I always took it for granted it was done with the consent of his partner or partners there; that is to say, the right to sell his own property and close up the business of S. N. Pike & Co. in Cincinnati. The good will of S. N. Pike & Co. was not sold. All the undertakings are those of Samuel N. Pike individually. I wish to qualify this statement and say, to the best of my information, Mr. Pike, Mr. Tilney, and Mr. Kidd, all residing in New York. I presume this matter was fully discussed and arrangements made to dispose of the property and close up their business at this point.

Q. 29. What business was Samuel N. Pike individually conducting, which he sold to Mills, Johnson & Co.?

(Objected to as leading, and as there is no proof to warrant the assumption.)

A. No active business, but was owner of the property and fixtures.

Q. 30. What was the price paid by Mills, Johnson & Co. to S. N. Pike for the property sold by him to them?

(Objected to as immaterial.)

A. I do not now recollect the exact amount, the consideration named in the deed, but think it $80,000 or $85,000—about ninety-five thousand dollars. I cannot tell without referring to the original entries.

Q. 31. Do you know how much the cash payment was?

(Objected to as immaterial.)

A. About fifty thousand dollars; the fixtures were sold separately.

In my former answer I confined myself to the real estate. About twenty-five to thirty thousand dollars, if my memory serves me, was the price of the fixtures.

198 Q. 32. Did the firm of Mills, Johnson & Co. take possession of the house in which S. N. Pike & Co. had done business and continue to do a similar business up to this time?

(Objected to as immaterial.)

A. They did take possession of the house, and I presume did continue to do a similar business.

Q. 33. Do you know whether or not advertisement was made in the newspapers that Mills, Johnson & Co. were successors to S. N. Pike & Co.?

(Objected to as immaterial.)

A. There was a paper given to Mills, Johnson & Co., by Mr. Pike, the precise language of which I do not now recollect. It was, however, published in the daily papers.

Q. 34. Do you know what Mr. Pike's intentions were as to the length of time during which he would continue in business in New York from and after the date of the sale to Mills, Johnson & Co.?

(Objected to as incompetent, leading, and improper.)

A. I do not positively; but Mr. Pike had named to me his intention of retiring from business in about eighteen months from the time of the conversation, the date of which I cannot now recollect. It was subsequent, however, to this sale.

Q. 35. Do you know what circumstances led him to remain in business for a longer period?

(Objected to as incompetent, as assuming, and as hypothetical in meaning.)

A. A combination of circumstances, among which was heavy stock of goods, at limitation of partnerships, and other private reasons that I may not know of, full enough to explain here.

199 Q. 36. Did you understand from Mr. Pike what part of the purchase money, paid by Mills, Johnson & Co., was the estimated value of the good will and trade-marks?

(Objected to as leading and assuming.)

A. No.

Q. 37. Did you ever hear him say anything on the subject?

(Objected to as already answered.)

A. The negotiation was made in New York, and consummated in Cincinnati. I never had any conversation as to what value he placed on trade-marks, brands, etc., according to my recollection.

Q. 38. What was the value of the real estate at that time, and at what price had Mr. Pike offered it to other parties? You are asked to state the value of the real estate irrespective of the value of the good will of any business.

(Objected to as incompetent, and last branch of question as assuming and leading, and as calling for hearsay.)

A. I do not know that I formed a judgment on the question of the value of the real estate alone. Mr. Pike had offered it to several others, according to report, but one offer I was aware of previous to sale, which was to Mr. Mills; I think about a year before the sale took place. The price then was about one hundred and twenty-five thousand dollars for the entire premises and fixtures. Mr. Pike at that time would not sell, fancying that Mr. Tilney would not give his full consent, subsequently found to be erroneous.

Q. 39. In the offer of which you speak, what was said about the good will?

(Objected to as immaterial.)

200 A. Nothing of the good will. It was understood that the party would have the advantages of the location and of the reputation of S. N. Pike and his business, precisely as he subsequently sold it.

(Last clause of answer objected to as incompetent, and as a conclusion of witness merely.)

Cross-examination:

Cross Q. 40. Are you active, in the capacity of executor in the estate of S. N. Pike, deceased, in the settling up of the same, at the present time?

A. I am aiding Mr. Tilney, who is the acting executor of the estate, in settling up the estate.

Cross Q. 41. Will you produce, if you can find it, the inventory or bill of sale, made by S. N. Pike, of the Cincinnati property, and give the exact amount which the property was sold at, both real and personal, or fixtures, and permit copies to be annexed to your deposition?

A. I find in my entry of October 1, 1868, of S. N. Pike's Sycamore-street property, to amount to $125.000. I offer copies.

(Copies annexed. Exhibits 2 and 3.)

Cross Q. 42. Will you also produce, for purpose of being copied, a memorandum which appears at the bottom of Exhibit 3, on page 583 of letter-press copy-book?

A. I will.

(Copy annexed, marked Exhibit 4.)

Cross Q. 43. State if the account referred to in 13th question and answer does not contain the following heading:

"CINCINNATI, *April* 1, 1865.

"Samuel N. Pike & Co., new firm, Dr. to merchandise: Invoice of stock, liquors, etc., as of the 15th October, 1864, transferred to new firm. 4th story, 85 bbls., etc."

201 A. Original invoice does not contain that heading. That is simply my entry in S. N. Pike's day-book. The items under this heading are taken from the original invoice, as made up by the parties in interest, in October, 1864, at the time of formation of new firm.

Cross 44. Are you now able to state the exact consideration of the deed of the transfer of the real estate on Sycamore street to Mills, Johnson & Co.? Have you refreshed your memory from memoranda or letters, so as to be able to state it definitely? And if so, please produce copies of such letters.

A. I have from a letter from Mr. Tilney, 26th August, 1868, on behalf of Pike, with reference to the sale. I am instructed to make the deed for consideration of $100,000, and fixtures, $25,000; total of $125,000. I find the consideration in the deed $100,000, and I find $25,000 for the fixtures. I will give a copy of the letter, as far as it relates to this transaction.

(Copy letter annexed, marked Exhibit 5 A.)

Cross Q. 45. I see a letter of date preceding the one just referred to, which is from Mr. Pike to you. Will you produce a copy of it, so far as it relates to this transaction?

A. I will.

(Copy letter annexed, of 21st August, 1868, marked Exhibit 5 B.)

WILLIAM R. WILLIAMSON.

Further taking of depositions adjourned till to-morrow, November 8th, 9 a. m.

E. L. DECAMP,
Notary Public.

202 9 A. M., NOVEMBER 8, 1873.

Pursuant to agreement, began to take evidence of Mr. William W. Johnson.

E. L. DECAMP,
Notary Public.

WM. W. JOHNSON, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, deposeth and saith as follows:

Q. 1. State your name, age, residence, and occupation.

A. Age forty-three years; reside in Cincinnati; engaged in wholesale liquor business, 18 and 20 Sycamore street, Cincinnati, Ohio, under the firm name of "Mills, Johnson & Co."

Q. 2. State if you sustained at any time any business relation with the late Samuel N. Pike; if so, what was its nature, in what business was Mr. Pike engaged, and where and when was it?

A. Yes, sir. I commenced with Mr. Pike in January, 1861, as traveling agent, in the wholesale liquor business; remained with him in that capacity until October 1, 1868, when Mr. Mills and myself bought him out.

Q. 3. Who were his partners in said business from 1861 until the sale to Mills, Johnson & Co.?

A. His brother-in-law, Mr. Lawrence Meyers, was a silent partner, when I commenced, until 1863; then he was alone until 1864 or 1865, when he took in his bookkeeper, Mr. Joseph Tilney, and George W. Kidd, his shipping-clerk; that continued until 1868, except Mr. Tilney, who withdrew in 1867.

203 Q. 4. In what part of the city was the business conducted and into what part of the country did the business extend?

A. The business was conducted at 18 and 20 Sycamore street, Cincinnati; also, a branch in New York. The business extended all over the United States.

Q. 5. What brands were made use of by S. N. Pike in said business?

A. These two brands in question and many others.

Q. 6. For what length of time had the "Dave Jones" and "Magnolia" brands been used by Mr. Pike, to your personal knowledge, prior to sale to Mills, Johnson & Co.?

(This question and previous one objected to, so far as it assumed that S. N. Pike personally made use of the brands in question.)

A. The "Dave Jones" brand had been used for ten or twelve years, and the "Magnolia" brand fifteen years and over.

Q. 7. Had been used by whom?

(Objected to as above, etc.)

A. By Samuel N. Pike.

Q. 8. Do you mean that they had been used by him for ten or twelve years prior to 1868, and no longer, or that your personal knowledge of such use only extended to that period?

(Same objection and leading.)

A. My personal knowledge.

Q. 9. In what premises in Cincinnati did S. N. Pike, individually, carry on business prior to the formation of the firm of S. N. Pike & Co.,

in 1864, and what branch or department of the business was carried on in those premises in Cincinnati?

204 (Objected to as immaterial.)

A. Wholesale liquor business; the same premises that we purchased from Mr. Pike and now occupy.

(Question repeated to witness.)

A. The wholesale liquor business.

Q. 10. What operations, embraced under the term "wholesale liquor business," were conducted in those premises by S. N. Pike, individually, prior to formation of the firm of S. N. Pike & Co., in 1864?

(Same objection.)

A. He bought high wines, redistilled them, and rectified them, and compounded and put them up and sold them under his own brands, such as were known to the trade.

Q. 11. State whether the article sold by Mr. Pike under the "Magnolia" and "Dave Jones" brands were included in those manufactured by Mr. Pike on those premises.

(Objected to as immaterial.)

A. They were.

Q. 12. State what business was continued in those premises after the formation of firm of S. N. Pike & Co., and by whom, and whether it embraced the manufacture of the same article, under the same brands, as previously by Mr. Pike.

(Latter part of question objected to as immaterial.)

A. The same business was continued by S. N. Pike & Co.; Joseph Tilney and George Kidd was the Co. It embraced the same articles under the same brands.

Q. 13. State who now own those premises, when they first became proprietors, from whom they bought, and what they paid.

(Same objection.)

205 A. Mills, Johnson & Co. own it; we bought it of S. S. Pike, in August, 1868, for $125,000. We did not take possession until October 1, 1868.

Q. 14. State whether that purchase at that price covered anything besides the real estate; and if so, what.

(Objected to as calling for secondary evidence, and as incompetent, the deed of sale being the best and only competent evidence of the fact.)

A. It covered everything just as it stood, except stocks, and a large safe, which latter he reserved, and which we bought separately afterward.

Q. 15. What particulars do you mean to be understood as embraced by the words "everything as it stood," in your last answer?

(Last objection continued.)

A. Property, machinery, fixtures, trade-marks, and good-will.

Q. 16. Do you remember whether the consideration for the entire purchase was the consideration named in the deed conveying the real estate? And if it was not, state what that consideration named in the deed was.

(Last objection continued, and as leading.)

A. I do not remember.

Q. 17. Do you remember whether there was a separate paper or bill of sale of the fixtures, utensils, etc., distinct from the deed conveying the real estate? If there was, can you produce the original?

(Objected to as immaterial.)

A. I think there was; we have the original if there was.

Q. 18. Do you know whether or not there is such a paper? If so, please state the facts.

206 (Objected to as already answered.)

A. I think there is.

Q. 19. You do not answer my question. I ask you if you knew, not what you thought. Please state whether you know of the existence of such a paper.

A. There were two separate bills.

Q. 20. Look at the paper now shown you, and state what it is.

A. It is a copy of the original; it is a bill of sale of the fixtures.

Q. 21. By whom was it written, to whom was it delivered, and when?

A. It was written by Mr. Williamson, Mr. Pike's bookkeeper; signed by S. N. Pike; delivered to Mills, Johnson & Co., October 1, 1868.

Q. 22. State whether or not it is one of the two conveyances which you have already said were executed at the time of the purchase by Mills, Johnson & Co., or for the purpose of carrying the same out.

A. It is.

(Counsel for Mills, Johnson & Co. now offers in evidence the said paper, which is attached hereto, marked Exhibit No. 2.

By consent a written copy is attached, made by the notary, in place of the original.)

Q. 23. In the negotiation with Mr. Pike for the purchase of this property, state what was the basis agreed upon by which you arrived at the entire consideration of $125,000, and how that was made up?

(Objected to as incompetent, calling for secondary evidence,

207 and as the contracts, or bill of sale, or deed show the only proper evidence, the consummation of the matter, and as already answered.)

A. We considered the property and machinery worth $50,000, the good-will and trade-marks, $75,000. I know we had a conversation with Mr. Pike, and we looked at it in that way.

(Applicants' counsel objects to the answer as incompetent.)

Q. 24. State whether or not at the time of the delivery of the deed and bill of sale of this property by Mr. Pike, in consummation of this purchase, any conversation took place between you and him in reference to the title and ownership and future use of the trade-marks previously used by him and the firm of S. N. Pike & Co. If so, state when and where it occurred, who was present, and what was said on that subject.

(Objected to as incompetent, the written contract of sale and deed being the only proper evidence of what was transferred, as all understanding merged in them at time of consummation, and hence any opinion or understanding of the witness cannot enlarge their terms.)

A. There was; in the office of our premises, at the time the purchase was made, or the deed was passed. Mr. Joseph Mills was present. Mr. Pike said he expected to retire from business in New York in about one year. I said, "Now, Mr. Pike, I want to ask you one question." (This is the precise language.) "Who owns these brands exclusively when you retire from business, and are done with them?" His answer was, "Mills, Johnson & Co., and you may do what you are a mind to with them." That was his precise language and words.

208 Q. 25. Look at the paper now shown you, and state what it is.

A. This is the deed for the property of 18 and 20 Sycamore, from S. N. Pike to Mills, Johnson & Co.

(Now counsel for Mills, Johnson & Co. offer said deed in evidence,

which is marked Exhibit No. 7, and it is consented that a copy made by the notary be substituted for the original exhibit.)

Q. 26. State whether this consideration of one hundred and twenty-five thousand dollars expressed in the deed and bill of sale was actually paid by Mills, Johnson & Co. to S. N. Pike; and if so, how and when?

A. It was. Fifty thousand cash down; the balance in yearly notes, with interest, five years, divided equally, of fifteen thousand dollars each, secured by mortgage upon the premises.

Q. 27. State whether any other security than a mortgage upon the premises for the deferred payments was required by Mr. Pike and given by Mills, Johnson & Co. If so, what was it?

(Objected to as immaterial.)

A. I think we gave him also an insurance policy upon the premises, if I am not mistaken. That was all.

Q. 28. Do you mean insurance policies on the building alone and the property purchased, or insurance on other property not bought from him? State also what amount of insurance was transferred.

(Objected to as immaterial and as calling for secondary evidence.)

A. I mean the insurance policy on the property purchased only. I don't recollect the amount transferred.

209 Cross-examination:

Cross Q. 29. Did not the terms of the mortgage back to S. N. Pike require you to keep the premises insured?

A. Well, I don't recollect about that.

Cross Q. 30. Please look at a copy of a letter which the notary will annex a copy of to this deposition of yours, and marked Exhibit 8, and state if you did not receive such a letter from S. N. Pike & Co. soon after its date, namely, 21st of November, 1870, and state if such letter was not in the handwriting of S. N. Pike.

(Objected to as incompetent.)

A. I don't recollect as I ever saw that letter before.

Cross Q. 31. Will you swear that your firm never received such a letter from S. N. Pike & Co., or that you never saw such a letter from them?

A. I said I don't recollect ever seeing it myself.

Cross Q. 32. Did you never hear of its receipt by your firm?

A. I don't recollect that I ever did.

Cross Q. 33. Do you believe that such a letter was never received by your firm at or about the time of its date?

A. I don't know anything about it. I can't believe anything that I don't know.

Cross Q. 34. Please look at the copy of a paper which I now show you, and which the notary will put in evidence as Exhibit 9, and state if that is not a letter from your firm to S. N. Pike & Co., and which acknowledges the receipt of alleged letter, Exhibit No. 8, and state if this does not refresh your memory as to letter shown by Exhibit 8.

210 A. That is something I don't know anything about. I wasn't home when those letters were written. I was in New Orleans from November to April.

WM. W. JOHNSON.

JOSEPH F. MILLS, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, deposeth and saith as follows:

Q. 1. Please state your name, age, residence, and occupation.

A. My name is Joseph F. Mills; my age is fifty-three years. I reside

in the city of Cincinnati, and am a liquor merchant and a member of the firm of Mills, Johnson & Co.

Q. 2. State how long you had been engaged as a dealer in liquors prior to the formation of the firm of Mills, Johnson & Co., if at all.

A. Twenty-eight years or over prior to the purchase from Mr. Pike.

Q. 3. State whether, prior to the formation of the firm of Mills, Johnson & Co., you had, individually or in connection with any one else, any negotiation with S. N Pike in reference to the purchase of his premises 18 and 20 Sycamore street, Cincinnati, and the business carried on by him there. If so, state when, in what year, it occurred.

(Objected to as immaterial.)

A. In the year 1866 or 1867 myself and Mr. Kline bought out Mr. Pike on Sycamore street, Cincinnati. I had negotiations with Mr. Pike, myself and Mr. Kline.

Q. 4. How were you and Mr. Kline related in business at that time, if at all, and what business were you engaged in, and where is Mr. Kline now?

211 A. At the date when we were negotiating with Mr. Pike we were not engaged in any business together only so far as closing up the old business of Mills & Kline. Mr. Kline resides in this county. He is now in St. Louis.

Q. 5. State what the negotiations between Mills & Kline and Mr. Pike embraced.

(Objected to as wholly irrelevant and immaterial.)

A. It embraced the purchase of his real estate on Sycamore street, on Yeatman street, which is the distillery building; all the fixtures appertaining to the property, stills, machinery of all kinds, all the tools, all the brands formerly made use of by the house of S. N. Pike & Co., and good will.

Q. 6. Did that negotiation result in an agreement of purchase and a price? If so, state what was that aggregate price.

(Same objections.)

A. It did result in a purchase and a price; price one hundred and twenty-five thousand dollars.

Q. 7. State whether, in arriving at that price agreed upon, a separate valuation was made by the parties of the good will and trade-marks. If so, state what it was.

(Same objections. A very leading question.)

A. A separate valuation was made by myself, Mr. Kline, and Mr. Pike. The valuation of the real estate, fixtures, stills, machinery, tools, fifty thousand dollars; good-will, brands, etc., seventy-five thousand dollars.

Q. 8. What do you mean by "and so forth," which you have attached to the word "brands" in your last answer?

(Same objections.)

212 A. Anything and everything appertaining to the business carried on by S. N. Pike & Co. not made mention of.

Q. 9. Was that purchase consummated? If not, why not?

(Same objections.)

A. It was not, on the ground of a representation made by Mr. Pike that his partnership with Mr. Kidd and himself had eight months' time further to run before the expiration of the same. He remarked that he did not wish to place himself in the hands of Mr. Kidd, which ended the purchase, so far as Mills & Kline were concerned.

Q. 10. State whether or not you took part personally in the negotia-

tions with Mr. Pike, which led to the purchase of his property by Mills, Johnson & Co.

(Objected to as immaterial.)

A. There was some correspondence between us; took place previous to Mr. Johnson going to New York to agree with Mr. Pike for his Cincinnati property. The preliminary purchase was made by Mr. Johnson in New York, and was completed in Cincinnati on the 1st of October, 1868.

Q. 11. State whether you had any conversation with Mr. Pike, in reference to the purchase, prior to the time when Mr. Johnson and himself had agreed on the terms of the purchase.

(Same objection.)

A. I think not.

Q. 12. State whether or not you were present at a conversation with Mr. Pike and Mr. Johnson, at the office on Sycamore street, in Cincinnati, when the purchase was consummated by the delivery of the papers.

(Objected to as incompetent and immaterial.)

213 A. I was present when the papers were delivered by Mr. Pike to Mills, Johnson & Co.

Q. 13. State what, if anything, was said on that occasion by yourself, Mr. Johnson, and Mr. Pike, in reference to the title and ownership and future use of the trade-marks previously used by S. N. Pike and S. N. Pike & Co.

(Objected to as incompetent, immaterial, and as leading.)

A. Mr. Pike said the title was clear and unincumbered. I mean the property was clear and unincumbered. When the deed was passed, we paid over our check to Mr. Pike for fifty thousand dollars. I then asked Mr. Pike what he considered that we had paid him the one hundred and twenty-five thousand dollars for, as I made the remark that I thought the price was rather large, but was too late for us to back out, as he had fifty thousand dollars of our money. Mr. Pike explained that to parties wishing to follow the business that the same was cheap at the price sold at. I then asked him the question, what value he put upon the real estate, the fixtures, the stills, tools, and machinery. He replied to me that I had once agreed with him for the property, and if I didn't remember what that consisted of. I replied back to him that I did. He asked me if I didn't remember what that was, and asked me to name the amount, which I did, by saying fifty thousand dollars for all the property, real estate, fixtures, stills, tools, machinery, and so forth; seventy-five thousand dollars for the brands and good-will. He replied back to me that that was his calculation when he sold out. He made the remark that my memory was very good. Mr. Johnson asked Mr. Pike, as Mr. Pike remarked at that time that he wished to make use of the

214 brands, that is, the same brands that he sold to Mills, Johnson & Co., for twelve months, at his New York house, as he then purposed retiring from business. He asked the use of the brands simply as a privilege, not as claiming any ownership. Mr. Johnson asked Mr. Pike who was the owners or the owner of those brands at the end of the twelve months. He replied back, "You are the exclusive owners by purchase, and if you do not protect them, it is your own fault."

Cross-examination:

Cross Q. 14. Please look at paper, Exhibit 8, and state if that is not a copy of a letter received by your firm, in November, 1870, from S. N. Pike & Co., New York, and was not such letter in handwriting of Samuel N. Pike?

(Question objected to as incompetent.)

A. It very likely is, as there has been a large correspondence taken place between us, on the subject of the right of brands, the use of the right of brands, in the different markets. I can't say it was in the hands of S. N. Pike or S. N. Pike & Co., the writing.

Re-examination:

R. D. 15. Please look at the paper now shown you, and state whether it is a letter-press copy of the letter of Mills, Johnson & Co. to S. N. Pike & Co., to which the letter referred to in your cross-examination was an answer.

A. This is an answer to a letter written S. N. Pike & Co., November 18, 1870. It is a letter-press copy of the letter written by Mills, Johnson & Co. to S. N. Pike Co., to which the letter referred to in my cross-examination is the answer.

215 (Counsel for Mills, Johnson & Co. here offers in evidence this letter of November 18, 1870, hereto attached, and marked Exhibit 10.

It is consented that a notarial copy be substituted for the press copy.)

Cross Re. 16. Please look at the copy made by notary, and marked Exhibit 11 (of a letter written to your firm by S. N. Pike & Co., dated 11th of November, 1870), and say if you were not mistaken when you gave your last answer.

(Question withdrawn.)

Cross Re. 17. State whether Exhibit 10 is not a copy of a letter which was in reply to a letter, a copy of which is now annexed as Exhibit 11?

A. It evidently is.

JOSEPH F. MILLS.

Pursuant to agreement, adjourned till 2.15 p. m. to-day, November 8, 1873.

E. L. DECAMP,
Notary Public.

According to agreement, resumed at 3.15 p. m. to-day.

E. L. DECAMP,
Notary Public.

MOSES H. SCHWARZENBERG, having been recalled and again duly sworn, says and deposeth as follows:

Q. 1. State whether or not you are acquainted with the value of the real estate and fixtures comprising the business house of S. N. Pike & Co., conveyed to Mills, Johnson & Co., at the time of that transfer October 1, 1868. If so, give them separately, and state whether or not you have been in the distilling and rectifying business long enough to be able to judge of such values, and state how long you have been in such business.

216 (Objected to as irrelevant, incompetent, and immaterial.)

A. Yes; I think I am; at least near to it. The real estate about that time, in 1868, the houses Nos. 18 and 20, I should judge were worth from $37,000 to $40,000, as near as I can guess at it. The fixtures at that time, such as boiler, rectifiers, were of no great value; the boiler itself was not safe, and it required a new outfit to do the business. I should not value them over and above $3,000 at that time. I have been in the rectifying business six years, and in the distilling business two years during that time. Know all about the apparatus used for distilling and rectifying.

Q. 2. State whether or not you ever had anything to do with the erection of distilling and rectifying establishments, either as proprietor, contractor, or in any other capacity.

(Objected to as immaterial.)

A. I had. In putting up my house on Second street, in the year 1868, I had the whole house newly fixed for rectifying. The same year I had my distillery put in running condition, in Milford, Clermont County, Ohio, I being one of the proprietors and general manager of the business. Firm name was L. W. Mack & Co., in Cincinnatti; Bevis & Co. and Mack & Co. in Milford.

Q. 3. State whether or not you are acquainted with the price of real estate in the neighborhood of 18 and 20 Sycamore street enough to approximate its value.

(Objected to as incompetent and too general and indefinite, and as immaterial.)

A. I have the common knowledge of property as a regular business man.

217 Q 4. State whether or not you owned or occupied any property in that neighborhood at this time, October, 1868. If so, where?

(Same objections continued.)

A. I occupied, right back of Pike's distillery, a store at that time.

Q. 5. State whether or not you were familiar with the sales made in that neighborhood, at that time, or a little before or a litte after, of property occupied for similar purposes, and for other business purposes.

(Same objections continued.)

A. I don't recollect any, except two adjoining stores to Mills, Johnson & Co. now, were sold, if I recollect right, for about $13,000—the Wollf's property, sold by O. J. Wollf; can't tell the date.

Q. 6. Do you recollect the sale of the Boyle, Miller & Co. property in that neighborhood?

(Same objections and as clearly incompetent.)

A. I do. It is on Second street, reaches back to Yeatman street; is a four-story building; four stores and a distillery attached in the rear. It is between Sycamore and Broadway, adjoining the Pike property.

(Applicants' counsel declines to cross-examine the witness.)

MOSES H. SCHWARZENBERG.

DAVID GIBSON, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, deposeth and saith as follows:

Q. 1. State your name, age, residence, and occupation.

A. David Gibson; age sixty years; am general commission merchant; reside in Cincinnati, Ohio.

21[illegible] Q. 2. State how long you have resided in Cincinnati, and if you are acquainted with the value of real estate in said city, and if you were so acquainted in 1868.

(Objected to as incompetent, irrelevant, and immaterial.)

A. I've resided in Cincinnati seventeen years, and in neighborhood twenty years more. I am so acquainted, and was so acquainted with value of real estate in 1868.

Q. 3. Were you acquainted with the value in 1868 of the real estate occupied by S. D. Pike & Co., at Nos. 18 and 20 Sycamore street; if so, what was its value, irrespective of the good-will of any trade or business?

(Objected to as incompetent, irrelevant, and immaterial.)

A. I was. The value was about $50,000.

Q. 4. Were you in negotiation at any time with Mr. Pike for the purchase of said property? If so, what price did he demand for it, and when was it?

(Objected to as incompetent, irrelevant, and immaterial.)

A. I was, and the price asked, to the best of my recollection, $90,000, and that was a few months before he sold it to Mills, Johnson & Co.

Q. 5. What was included in that offer?

(Objected to as incompetent, irrelevant, immaterial, and leading.)

A. Well, the ground, buildings, all the fixtures, brands, good-will, and everything of the kind.

Q. 6. Did you, at any time, have any conversation with Mr. Pike after his sale to Mills, Johnson & Co., in which that sale was spoken of?

(Objected to as incompetent, irrelevant, and immaterial.)

A. Don't think I had.

219 Cross-examination, de bene esse:

Cross Q. 7. What do you deal in, as a general commission merchant, principally?

A. Whisky and grain, flour, hops; whisky is the biggest item.

Cross Q. 8. Do you not deal with Mills, Johnson & Co.?

A. I sell them high wines often.

Cross Q. 9. Who called on you to give testimony in this case, and when?

A. Mr. Johnson spoke to me about it yesterday and to-day.

Cross Q. 10. Did he not talk to you about fifty thousand dollars being about the price or value for the naked property?

A. No, sir; he did not.

Cross Q. 11. Was not that sum mentioned between you before you came here to testify?

A. I may have said to him it was worth fifty thousand dollars, but he didn't say anything to me. I may have said that fifty thousand dollars was all the property was worth, but I am not sure about that either. I bought a piece of property adjoining, about six or eight months ago, twenty-one feet front, five stories high, same depth, but not a stone front, like theirs, but as well built, for eight thousand two hundred dollars.

(All of answer as to purchase of piece of property objected to as not responsive and volunteer.)

Cross Q. 12. Will you swear positively that Mr. Johnson did not mention the sum of fifty thousand dollars to you?

220 A. He didn't name any sum until after I had named that sum myself, and I don't think he named it then.

DAVID GIBSON.

CHAS. L. MOORE, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows:

Q. 1. Please state your name, age, residence, and occupation.

A. My *age* is Chas. L. Moore; my age, forty-one; residence, Cincinnati; am an accountant of the Liverpool and London Globe Insurance Company, Cincinnati General Agency.

Q. 2. State if you were acquainted with the late Samuel N. Pike; if so, during what period? State also how long you have resided in Cincinnati, and in what business you have heretofore been engaged.

A. I was, for nearly twenty years; have resided in Cincinnati twenty-three years; was previously engaged in the wholesale grocery trade; then I was engaged with Mills, Johnson & Co.; then with S. N. Pike &

Co.; then with a city insurance company; then my present occupation.

Q. 3. State if, at any time, you had any conversation with the late Samuel N. Pike, touching the rights of Mills, Johnson & Co. in the "Dave Jones" and "Magnolia" trade-marks; if so, state fully the time and place of such conversation, the circumstances under which it was had, and all that was said?

(Objected to as incompetent and immaterial.)

A. Yes, I did; at their office in New York, in 1869. I was sent
221 there by Mills, Johnson & Co., touching the matter. I represented to S. N. Pike & Co.—Mr. Pike and Mr. Kidd were both present—that they were using these brands which they had purchased of Pike & Co. to their detriment in trade, and the object of that visit was to have an understanding with them as to why they were using them after having sold the right to use them to Mills, Johnson & Co. I stated to Mr. Pike and to Mr. Kidd the complaint that Mills, Johnson & Co. made, which was their unauthorized use of these brands. Mr. Pike stated that it was true that he had sold these brands for a valuable consideration, and he thought Mills, Johnson & Co. were right in their demand that their use should be discontinued by the New York house of S. N. Pike & Co. Mr. Kidd objected that as he received no part of the consideration of that sale, that he would do as he pleased as to their use. The matter was argued pro and con, Mr. Pike taking the same view that I did of Mills, Johnson & Co.'s rights, but failing, at that interview, to obtain Mr. Kidd's consent to discontinue their use. On the following day we met again, and the matter, so far as my agency was concerned, was arranged temporarily by Mr. Kidd's agreeing not to sell the brands named west of Buffalo, New York. I cannot state all that was said at these two interviews, but have stated substantially the results.

Q. 4. Can you state the language made use of by you in the first interview in setting forth the claim of Mills, Johnson & Co.?

(Objected to as immaterial.)

A. I made an emphatic demand that the use of these brands should be discontinued by them. That's pretty hard to do; that is, to give the language.

222 Q. 5. If you cannot give the language, give the substance of what you said to them in stating what Mills, Johnson & Co. claimed?

(Objected to as incompetent and immaterial, and as answered by the witness as far as he is able to.)

A. I stated to Mr. Pike and Mr. Kidd that Mills, Johnson & Co., having bought these brands of Mr. Pike, and the continued use of them by his firm was a pecuniary damage to them, and we wanted it stopped.

Q. 6. Did Mr. Pike, in that conversation, deny that Mills, Johnson & Co. had the rights which you stated they claimed?

(Objected to as incompetent, immaterial, and leading.)

A. He did not, but rather acquiesced in it.

Q. 7. Were any particular sales or transactions of the New York house the immediate occasion of your visit to New York; if so, what were they?

(Objected to as immaterial.)

A. I don't remember distinctly of any particular sales, but think it had reference to inquiries from Eastern houses.

Q. 8. How long after that visit did your connection with Mills, Johnson & Co. continue?

A. About four or five months.

Q. 9. During that period, was the agreement of Kidd, that the New

York house would not sell west of Buffalo, complied with, so far as you know?

A. It was.

Q. 10. Were you acquainted with the value of real estate in this city in 1868? If so, what was the value of the real estate purchased by Mills, Johnson & Co. of Mr. Pike, irrespective of the good-will of any trade or business?

223 (Objected to as incompetent, irrelevant, and immaterial.)

A. I had some knowledge of the value of real estate; I think the real estate, without any machinery or fixtures, was worth from forty to fifty thousand dollars.

Q. 11. Is that property in a part of the city which, in 1868, and for some years prior thereto, had been increasing or decreasing in value?

(Objected to as incompetent, immaterial, and leading.)

A. The tendency was to a decrease in value, the reason being that business was gradually moving westward.

Q. 12. Were you acquainted with Mr. Tilney, and did you have any conversation with him while in New York, on the occasion of which you have spoken?

(Same objections continued as before as to this branch.)

A. I am acquainted with him, and did have a conversation with him about this matter.

Q. 13. What did he say on this subject?

(Same objections continued.)

A. He said that Mr. Kidd was unreasonable in his demands, and that he ought not to use the brands.

Cross-examination de bene esse:

Cross Q. 14. Where was Mr. Tilney and yourself when the conversation took place of which you have given a part in your last answer?

A. On Beach street, or possibly on Broadway, in his office, I think.

Cross Q. 15. Was any one present but yourself and Tilney?

A. No, sir.

224 Cross Q. 16. How were you employed by Mills, Johnson & Co.?

A. General clerk and correspondent.

Cross Q. 17. From when until when?

A. From October, 1868, to May, 1869, I think.

Cross Q. 18. Can you give the exact date of this visit to New York?

A. About the 30th of January, 1869.

Cross Q. 19. Have you given all the conversation that took place between yourself, Mr. Pike, and Mr. Kidd, as to the dispute between the two firms and the proposed arrangement?

A. I probably have not said everything that was said on this occasion. I have given all the material points in which I was interested.

Cross Q. 20. Who was present on the second day at the interview besides Pike, Kidd, and yourself?

A. No one.

Cross Q. 21. Who else, if any one, at first interview?

A. No one.

CHAS. L. MOORE.

GEORGE H. BROOKS, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, deposeth and saith as follows:

Q. 1. Please state your name, age, residence, and occupation, and the name of your firm.

A. My name is George H. Brooks; I am forty-six, and reside in Cin-

cinnati; name of firm Walsh, Brooks & Kellogg; redistilling whisky business.

225 Q. 2. State what knowledge you have, if any, touching the value of the real estate and fixtures sold by S. N. Pike & Co. to Mills, Johnson & Co., in 1868, and your means of knowledge on the subject.

(Objected to as incompetent, irrelevant, immaterial, and leading.)

A. Well, about a year before Pike went out of business, I was one of several parties who proposed to buy out that establishment, and in talking with those parties with whom I expected to be interested the probable value of the real estate and good-will was canvassed, and after giving the matter considerable thought, I came to the conclusion that the real estate might possibly be worth thirty thousand dollars, and the distillery—that is, the internal arrangements; that is, the stills, tubs, and so forth—might be worth from ten to twenty thousand dollars, and the good-will of the establishment, which comprised brands—name—might be worth fifty thousand dollars, making the total value of the property ninety to a hundred thousand dollars. I learned at the time, through the party with whom I expected to be interested, who done the talking with Mr. Pike, that his price for the property, including the brands and so forth, was a hundred and fifty thousand dollars, and that we authorized—that is, myself and some other parties that I expected to be connected with in the affair—authorized this party previously spoken of to make an offer of one hundred thousand dollars, which offer was refused.

(Applicants' counsel declines to cross-examine the witness.)

GEO. H. BROOKS.

226 CHARLES L. MILLS, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, deposeth and saith as follows:

Q. 1. Please state your name, age, residence, and occupation.

A. My name is Charles L. Mills; my age is twenty-nine; reside in Cincinnati; engaged in the liquor business; am a member of the firm of Mills, Johnson & Co.

Q. 2. State if you were acquainted with the late Samuel N. Pike, and if you were present at any time and a participant in any conversations to which the said Samuel N. Pike was a party upon the subject of the rights of Mills, Johnson & Co. in the two brands in question. If so, state when and where such conversations were held, who were present, and what was said, stating all the particulars, and giving the language used by each person so far as possible.

(Objected to as incompetent and immaterial.)

A. I was acquainted with the late Samuel N. Pike. I was present at several interviews between Mr. Pike, Mr. J. F. Mills, Mr. Johnson, and myself. Said conversations took place in the office of Mills, Johnson & Co., 18 and 20 Sycamore street, in this city, at various times, ranging from the date of our purchase, October 1, 1868, well up to along in 1872, probably the spring of 1872. When we bought Mr. Pike out we conceded the right to his using the brands in New York City for a period of about one year, and a portion of the conversation in 1869 was upon agreement of price, at which Mills, Johnson & Co. and S. N. Pike should sell "Dave Jones" whisky at in Eastern market so as not to de-

227 preciate the brand. After that, in 1870, we had conversation upon Mr. Pike's continuing the use of the brands, as the year we had consented for him to use them had expired. During 1869, when we

were using the trade-marks in common, there had been some considerable controversy as to price we were selling "Dave Jones" whisky at. Dealers in the trade were representing to us they could buy the goods less of S. N. Pike, and to S. N. Pike that they could buy them for less of us. That was the basis of the main conversation in 1869. We claimed after 1870 to Mr. Pike he had no right to the use of the brands in the East. He replied we had a large trade without going into the Eastern markets, and that it would eventually be to our benefit, as we now had as much trade as our capital would justify. All the subsequent conversations resulted in about the same.

Q. 3. What response was made by your firm to these views of Mr. Pike, by which member or members of your firm was the response made, and in what language?

(Same objections.)

A. The conversation was usually carried on either by Mr. Johnson or Mr. J. F. Mills. They claimed that Mr. Pike agreed to go out of business in one year, and insisted upon our rights, as far his contract with us.

Q. 4. Were the brands and good-will of S. N. Pike & Co., including the brands in question, purchased by Mills, Johnson & Co.? If so, what price?

(Objected to as leading and too general.)

A. They were. We paid S. N. Pike one hundred and twenty-five thousand dollars for the brands in question, including real estate at 18 and 20 Sycamore, and fixtures.

228 (Answer objected to by applicants' counsel as incompetent and secondary evidence.)

Q. 5. What part of the purchase-money was estimated to be the value of the good-will and brands?

(Objected to as incompetent, and objected to as above.)

A. Estimated at seventy-five thousand dollars by me.

Q. 6. What was estimated at seventy-five thousand dollars?

(Same objections continued.)

A. Good-will and brands.)

Cross Q. 7. Are you a son of the senior member of your firm, J. F. Mills?

A. I am.

Cross Q. 8. What was your business, if any, prior to the formation of such firm?

A. I was engaged in the wholesale grocery business, a member of the firm of J. F. Mills & Co., Cincinnati; afterward a member of the firm of Mills, Brother & Co., in the liquor business, Cincinnati, and also Mills, Son & Co., liquor business, Cincinnati.

Cross Q. 9. State if your firm did not receive, about December 19, 1870, from Joseph Tilney, a letter of which I now show you a copy, and a copy of which is here annexed to your deposition as Exhibit 12.

A. I could not tell without seeing the original letter.

Cross Q. 10. Is the matter referred to in Exhibit 12 that which you have referred to in the giving of your answer to the second direct interrogatory?

A. I have not.

Cross Q. 11. Why did you not?

229 A. Correspondence with Joseph Tilney is not an interview with S. N. Pike.

Cross Q. 12. I asked you as to the subject-matter of the letter. Do

you mean to swear that there was no conversation between the parties respecting it?

A. There was.

Cross Q. 13. Why, then, did you not mention this matter in the giving of your second answer?

(Question objected to, as calculated to deceive and mislead the witness, and as assuming incorrectly that he did not allude, in his answer to the second question, to the controversy between S. N. Pike and Mills, Johnson & Co., touching their right to use the brands in question.)

A. I don't consider the result of a conversation between Mr. Pike and ourselves has anything to do with the correspondence of Joseph Tilney.

Cross Q. 14. Is this the best answer you can make to cross-question 13?

A. It is.

Cross Q. 15. Will you swear that everything you have stated in the second answer relates to conversations in which Mr. Pike took a part?

A. I do.

Cross Q. 16. Do you know when Mr. Pike left Cincinnati to remain permanently in New York?

A. I do not. Prior to October, 1868.

Cross Q. 17. Who conducted the negotiations for the purchase of the Sycamore street property with Mr. Pike?

A. Mr. Johnson and Mr. J. F. Mills.

230 Cross Q. 18. Are you prepared to testify that you can state what took place at the various conversations, that is, give the language of the parties referring to this Sycamore street purchase and good-will of the business?

(Objected to as calculated to deceive and mislead the witness, it being uncertain whether the question relates to the conversations at which the witness has stated that he was present, or to conversations between Mr. Pike and the partners of the witness during negotiations for the sale, as to which he has not testified.)

A. I don't know what conversations you allude to. If Mr. Pike, J. F. Mills, and Mr. Johnson, in negotiations for the purchase, I cannot, as I was not present.

Cross Q. 19. I only expect you to testify respecting any at which you were present, and have reference only to your answer to the second interrogatory. Now, please answer cross interrogatory 18.

A. I can give the substance of such conversations.

Cross Q. 20. Do you mean as you have in your answers to direct second and third interrogatories?

A. Yes.

Cross Q. 21. Are you prepared to swear that there exists a contract as stated in your fourth answer; and, if so, can you produce it?

A. The contract was verbal.

Cross Q. 22. With whom was that contract made, if you know?

A. Mr. Johnson and Mr. J. F. Mills.

Cross Q. 23. Do you mean by contract a conversation held between Mr. Pike, Mr. Johnson, and Mr. J. F. Mills?

A. Yes, at the time of the purchase.

231 Cross Q. 24. Can you give the date of such conversation?

A. The negotiation for the purchase was made in August, 1868, and this conversation occurred at the time of the negotiation for the purchase, so represented by Mr. J. F. Mills and Mr. Johnson to me.

Re-examination:

R. De. 25. You are asked, in cross-interrogatory 23, whether the contract by which S. N. Pike agreed to retire from business, at the end of twelve months after your purchase, was a conversation. Please state what you mean by that; was it a contract, or was it a conversation?

(Objected to as immaterial, and as asking the witness a question of law, and clearly incompetent.)

A. I understood it to be a contract.

CHARLES L. MILLS.

I, E. L. DeCamp, a notary public within and for the county of Hamilton and State of Ohio, do hereby certify that Moses H. Schwarzenberg, Wm. R. Williamson, William W. Johnson, Joseph F. Mills, David Gibson, Chas. L. Moore, George H. Brooks, and Chas. L. Mills were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed, as above set forth, were reduced to writing by myself, in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notices specified; that I am not counsel, relative, or
232 attorney of either party, or otherwise interested in the event of this suit, and commenced at the time in the notices specified, and continued by adjournments from day to day, as above specified.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

233 EXHIBIT 1.

"CINCINNATI, *October* 15, 1864.

"The undersigned, Sam'l N. Pike, Joseph Tilney, and George W. Kidd, enter into partnership together, to conduct a general whisky business, in the cities of Cincinnati and New York. They agree with each other as follows as to the terms and conditions of said partnership: 'The style of the firm in both cities to be Sam'l N. Pike & Co. Term of partnership, for three years from this date, with the privilege of a continuance of it for two years longer, by mutual consent. The individual interest of each in the profits and losses of the business to be borne in the following proportions: to Sam'l N. Pike, one-half; to Tilney, five-sixteenths, and to George W. Kidd, three-sixteenths. Rent of the distillery premises and fixtures in same, in Cincinnati, to be paid to Sam'l N. Pike, at the rate of seven thousand five hundred dollars per annum, during the term of partnership. For the excess of capital paid into the concern by Sam'l N. Pike over and above the amount paid in by the other partners, interest shall be given him at the rate of six per cent. per annum. J. Tilney may draw out of the profits of the business $7,000 per annum, and G. W. Kidd $4,000 per annum. The new firm will assume the lease of the distillery and premises in New York from Johnson & Lazams, on the same terms as granted to S. N. Pike, said lease being executed to S. N. Pike by J. & L.'

"SAM'L N. PIKE.
"J. TILNEY.
"GEO. W. KIDD.

"WM. R. WILLIAMSON."

234 STATE OF OHIO,
Hamilton County, ss:

I hereby certify the above Exhibit 1 is a true copy of the orig[illegible]nal paper offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

EXHIBIT 2.

CINCINNATI, *October* 1, 1868.

Mills, Johnson & Co. To real estate, 18 & 20 Sycamore street, Cin., O.

Consideration for Sycamore street property, known as distillery lot, sold per agreement 25th August last, on following terms:

Cash, 1st Oct	$50,000	
" 1 year	15,000	
" 2 "	15,000	
" 3 "	15,000	
" 4 "	15,000	
" 5 "	15,000	
		$125,000

With quarterly interest 6 per cent., payable as follows:

3 months from Oct. 1, 1868	$1,125	
6 "	1,125	
9 "	1,125	
12 "	1,125	
15 "	900	
18 "	900	
21 "	900	
24 "	900	
235 27 months from Oct. 1, 1868	$675	
30 "	675	
33 "	675	
36 "	675	
39 "	450	
42 "	450	
45 "	450	
48 "	450	
51 "	225	
54 "	225	
57 "	225	
60 "	225	
		$13,500
		$138,500

STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 2 is a true copy of the original paper offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 3.

CINCINNATI, *October* 1, 1868.

Messrs. MILLS, JOHNSON & Co.:

All the stills, tubs, engines, boilers, and tubing, together with all apparatus connected therewith used in my distillery, situate on east side of Sycamore street, 18 and 20, Cincinnati, Ohio, $25,000.

(Signed) SAM'L N. PIKE.

236 STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 3 is a true copy of the original paper offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 4.

Having sold to Messrs. Mills, Johnson & Co. my premises, No. 18 and 20 Sycamore street, I hereby extend to them and their successors the use of all my brands formerly used by me in my Cincinnati house.

(Signed) SAM'L N. PIKE.

Cincinnati, October 1, 1868.

STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 4 is a true copy of the original paper offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 5—(A).

[Extracts of letter of Mr. J. Tilney to Mr. W. R. Williamson.]

"NEW YORK, *August* 26, 1868.

"DEAR MR. WILLIAMSON: Inclosed is Mr. Pike's letter to Messrs. Mills & Johnson, acknowledging their acceptance of his offer, which please hand them. The sale includes the property, fixtures, and
237 office furniture (excepting the large office safe), and the use of the brands, for $125,000. . . . Deed of the property for $100,000, and give them a bill of sale for the fixtures for $25,000, receiving back a mortgage on the property for $75,000, payable in five annual installments of $15,000 each, with interest added, payable quarterly; the property to be insured for his benefit for $25,000 until the mortgage is paid. Possession to be given 1st October."

STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 5(A) is a true copy of the original paper offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 5—(B).

[Extracts of letter of Mr. S. N. Pike to Mr. W. R. Williamson.]

"NEW YORK, *August* 21, 1868.

"W. R. WILLIAMSON, Esq.:

"MY DEAR SIR: Johnson arrived here this afternoon. He, it appears, is not authorized to close at my price, but he telegraphed to Mills that I would not take less than the price offered. He will doubtless get his reply by to-morrow. If we close, it will take effect 1st October. Meantime everything in the house Nos. 18 and 20 will have to be removed, except the fixtures in the building and office furniture, excepting the large safe, which is in the building, will have to be put in Nos. 22 and 24. They will have the use of all the brands."

238 STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 5 (B) is a true copy of the original paper offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 6.

[Manufacturer of the Celebrated XXX and Magnolia Whisky, Alcohol, Cologne, Pure Spirits, Brandy, Gin, Port and Malaga Wine, Catawba Brandy made from Grapes, Bourbon, Monongahela, and Rye Whisky.]

CINCINNATI, *October* 1, 1868.

Messrs. Mills, Johnson & Co. bought of Samuel N. Pike, Nos. 18, 20, 22 *and* 24 *Sycamore st., between Columbia and Front,*

All the stills, tubs, engines, boilers, and tubing, together with all apparatus connected therewith, and in my distillery, situate on east side of Sycamore street, 18 and 20, Cincinnati, Ohio, $25,000.

SAM'L N. PIKE.

[2c. U. S. internal revenue stamp.]

Having sold to Mills, Johnson & Co. my premises, Nos. 18 and 20 Sycamore street, I hereby extend to them and their successors the use of all my brands formerly used by me in my Cincinnati house.

SAM'L N. PIKE.

Cincinnati, October 1, 1868.

239 STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 6 is a true copy of the original paper offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 7.

Know all men by these presents, that Samuel N. Pike and Ellen M.

Pike, his wife, of the city of New York, in consideration of one hundred thousand dollars to them paid by Joseph F. Mills, William W. Johnson, and Charles L. Mills, partners as Mills, Johnson & Co., of the city of Cincinnati, Ohio, the recipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said Joseph F. Mills, William W. Johnson, and Charles L. Mills, their heirs and assigns forever, the following real estate situate in the city of Cincinnati, county of Hamilton, State of Ohio, and described as follows, to wit: part of the south half of inlot number twenty-eight, in the original plan of said city, beginning at the division line in said inlot on Sycamore street, thence southwardly with the east line of Sycamore street thirty-eight (38) feet, more or less, to Yeatman street; thence with the north line of Yeatman street eastwardly one hundred and sixty-four (164) feet, more or less; thence northwardly sixty-four (64) feet; thence westwardly fifty-nine (59) feet more or less, with the right to use forever a strip of land nine inches wide and fifty-nine feet long, immediately north of said fifty-nine feet call, for a party wall; thence southwardly to the division line between the north and south half of said inlot No. 28 thirty-one (31) feet; thence westwardly along said division line one hundred and five (105) feet to the place of beginning, and being the same premises conveyed by Samuel Fosdick and wife to Samuel N. Pike and Henry Pike, by deed recorded in book No. 159, page 178, Hamilton County records, and by Abraham Wolf, Isaac Wolf, and Daniel Wolf and wives, to Samuel N. Pike, by deed recorded in book No. 227, page 137, Hamilton County records, reference to the same being had; and all the estate, title, and interest of the said Samuel N. Pike and Ellen M. Pike, either in law or equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; to have and to hold the same to the only proper use of the said Joseph F. Millls, William W. Johnson, and Charles L. Mills, their heirs and assigns forever. And the said Samuel N. Pike and Ellen M. Pike, for themselves and for their heirs, executors, and administrators, do hereby covenant with the said Joseph F. Mills, William W. Johnson, and Charles L. Mills, their heirs and assigns, that they are the true and lawful owners of the said premises, and have full power to convey the same; that the title so conveyed is clear, free, and unincumbered; and further, that they will warrant and defend the same against all claim or claims of all persons whomsover.

In witness whereof the said Samuel N. Pike and Ellen M. Pike, his wife, who hereby releases all right and expectancy of dower in said premises, have hereunto set their hands and seals this 15th day of September, in the year of our Lord one thousand eight hundred and sixty-eight.

SAMUEL N. PIKE. [SEAL.]
ELLEN M. PIKE. [SEAL.]

Signed, sealed, and acknowledged in presence of us.
S. LASAR.
SIMON A. WOLF.

[50c. U. S. internal revenue stamp.]

THE STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on the fifteenth day of September, in the year

of our Lord one thousand eight hundred and sixty-eight, before me, Sigismund Lasar, a commissioner of Ohio, personally came Samuel N. Pike and Ellen M. Pike, his wife, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed, for the uses and purposes therein mentioned. And the said Ellen M. Pike, wife of the said Samuel N. Pike, being examined by me, separate and apart from her said husband, and the contents of said deed being by me made known and explained to her as the statute directs, declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith, as her act and deed, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, on the day and year aforesaid.

[SEAL.] SIGISMUND LASAR,
A Commissioner of Ohio in New York.

242 STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 7 is a true copy of the original deed offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Received October 2, 1868, and recorded in book 358, page 530.

[SEAL.] THOMAS L. YOUNG,
Recorder, Hamilton County, Ohio.

Exhibit 8.

CINCINNATI, *November* 21, 1870.

Messrs. MILLS, JOHNSON & CO.:

DEAR SIRS: Your favor of the 18th inst. just to hand. We send you an abstract of the agreement with you and Mr. Pike, which is short and simple and easily understood:

"Having sold to Messrs. Mills, Johnson & Co. my premises, No. 18 and 20 Sycamore street, I hereby extend to them the use of all my brands, formerly used by me in my Cincinnati house."

Mr. Pike denies having any verbal, or any understanding whatever with you outside of the above. We therefore reiterate the language of our last respects to you with reference to the card enclosed to you, with the hope you will not use the copyright added to the Dave Jones brand.

We also claim that we can establish ourselves anywhere in busi-
243 ness if we are desirous of doing so, but would not care, unless forced to it through your own misconception of your interest.

Yours, truly,
(Signed) SAMUEL N. PIKE & CO.

STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 8 is a true copy of the original paper offered in evidence.

[SEAL.] E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 9.

CINCINNATI, *November* 28, 1870.

S. N. P. & Co., N. Y.:

In reply to yours of the 21st inst., we have merely to repeat what we said in ours of the 18th inst., and are determined to stand upon our rights as we then stated them. We are sincerely desirous, however, of a better understanding between us on the subject, and if you can suggest any amicable arrangement which will definitely settle the present controversy and be likely to establish permanently such relations between us as will not be disturbed by further misunderstandings, we shall be glad to hear from you.

(Signed) MILLS, JOHNSON & CO.

STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 9 is a true copy of the original paper produced in the examination.

[SEAL.]

E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

244 *Exhibit* 10.

NOVEMBER 18, 1870.

Messrs. SAMUEL N. PIKE & Co., *New York:*

GENTLEMEN: Your favor of November 11th has been at hand for some days. The circumstances which have led to this correspondence makes it proper that we should come at once to a complete and definite understanding of our mutual rights and relations. We therefore now take occasion to submit our view of them.

On the 1st day of October, 1868, we completed the purchase from Mr. Pike of his business in this city, including all his brands. The bill of sale given was by Mr. Pike, in writing, and gives us the sole and exclusive title to all these brands, and this right we could maintain if we chose to do so. We admit, however, that there was a verbal understanding with Mr. Pike that he should have the right to continue in business in New York one year, and during that time he should be entitled to the joint use of these brands. This period has elapsed, and Mr. Pike has not retired from business, and still continues the use of our brands. In addition to this, we were made aware of the fact that about one year ago a firm in this city was authorized by you to use one of our most valued brands, and had actually commenced to do so. This, however, we have been assured, and do not doubt, was without the personal knowledge or approval of Mr. Pike. Our attention is next called to the fact that Mr. Pike's name, the firm name of your house in
245 New York, and the name of the firm whose business and goodwill we purchased, as before stated, has been placed upon a storehouse in this city, on Burnet street, between Walnut and Vine streets, and has remained there during one year, and is there now.

Following these open violations of our rights is an attempt, not merely to continue the use of one of our brands—the "Dave Jones"—but to obtain the exclusive use of it, by means of an addition to it, and we are threatened with legal proceedings for attempting to protect ourselves in the use of our own brands.

In view of these events, we feel called upon to say that, having paid

a large amount of money in consideration of the transfer to us of the brands and good-will of S. N. Pike & Co., we must now insist that the contract with us shall be fulfilled in the following respects: We insist, 1. That the sign bearing the name of S. N. Pike & Co., before referred to, shall be immediately taken down, and that this name shall not be employed in business of a similar character in this city or elsewhere outside of New York City. 2. We insist that the addition to the "Dave Jones" brand, before referred to, shall not be further used. This brand is only used by yourselves and the writers; if other persons attempt to use it the law will afford ample protection against them, and your use of this addition is simply an attempt, as we before stated, to prevent us from the beneficial use and enjoyment of our own property.

In making these requirements we are requiring also that you shall totally discontinue the use of Mr. Pike's name and these brands. We wish it to be distinctly understood that we do not give our consent to the continuance of that use, or waive our right to compel the
246 disuse of the same, whenever we shall choose to do so. We do not desire litigation, especially with Mr. Pike, with whom we desire and hope to maintain cordial relations, but we will insist upon the above conditions. We have taken the opinion of counsel upon the questions at issue between us, and the views now presented are fully justified by them.

We are, gentlemen, very respectfully, yours,

MILLS, JOHNSON & CO.

STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 10 is a true copy of the original paper offered in evidence.

[SEAL.]

E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 11.

NEW YORK, *November* 11, 1870.

Messrs. MILLS, JOHNSON & Co.:

DEAR SIRS: We understand you are using an exact copy of the inclosed, with your signature, on the "Dave Jones" brand of whisky. This is an infringement which we cannot permit, as you have no right to use it. Mr. Pike did not have this addition when he gave you the use of his brands. We therefore insist that you desist using the same on the "Dave Jones" packages.

Yours, truly,
(Signed) S. N. PIKE & CO.

247 STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 11 is a true copy of the original paper offered in evidence.

[SEAL.]

E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Exhibit 12.

NEW YORK, *December* 19, 1870.

Messrs. MILLS, JOHNSON & Co.:

DEAR SIRS: I have had a conversation with Mr. Pike on the matter

in controversy between you, and his proposal is that you will agree not to sell the "Dave Jones" brand of whiskey in "New York and the New England States;" and they (S. N. P. & Co.), while in business in New York, will engage not to sell the "Magnolia" brand whisky in "Southwestern States." The New England States including and being Maine, New Hampshire, Vermont, Rhode Island, Connecticut, and Massachusetts, and the Southwestern States being and including Louisiana, Texas, Mississippi, Alabama, Missouri, and Tennessee. It seems to me that an understanding like this is equally fair to both parties, and, livedup to in good faith by both, will prevent further misunderstandings between you; and in that spirit I recommend it to you. Money matters are tight here, and will probably remain so till after New Year's. Should you require any after that, you might write me.

Yours, truly,
(Signed) J. TILNEY.

248 STATE OF OHIO,
Hamilton County, ss:

I hereby certify that the above Exhibit 12 is a true copy of the original paper offered in evidence.

[SEAL.]

E. L. DECAMP,
Notary Public, Hamilton County, Ohio.

Notary's fees, fifty dollars; paid by Mills, Johnson & Co.

(Indorsement on cover:) No. 247. George W. Kidd, appellant, vs. W. W. Johnson & Co. Louisiana C. C. U. S. Filed 8th October, 1877.

REC. 247—9

SUPREME COURT U.S.
FILED
APR 5 1882
A.M. MIDDLETON, CLERK

Supreme Court of the United States.

No. 247.

GEORGE W. KIDD, APPELLANT,

vs.

W. W. JOHNSON AND COMPANY.

Appeal from the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR APPELLANT.

R. T. MERRICK,
M. F. MORRIS,
Of Counsel for Appellant.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 247.

GEORGE W. KIDD, APPELLANT,

vs.

W. W. JOHNSON AND COMPANY.

Appeal from the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR APPELLANT.

I.

STATEMENT OF CASE.

The question in controversy in this case is the ownership of a certain trade-mark, which has become quite valuable.

The record in the case discloses the following facts: About the year 1848, S. N. Pike and Henry Pike were engaged in Cincinnati, Ohio, in the manufacture of whiskey, of which various brands made by them became noted in the trade, and among others, one sold under a trade-mark of their adoption, consisting of the words—"S. N. & H. Pike's Magnolia Whiskey, Cincinnati, Ohio,"—surrounded by a circle, (Record, p. 28.) About 1854, Henry Pike retired from the firm, and S. N. Pike continued the business

on his account, and changed the designation of the trade-mark to—"S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio,"—a designation which remained unchanged through all the subsequent mutations of the business. In 1857 or 1858, S. N. Pike formed with one Lawrence Myers the firm of S. N. Pike and Company. Myers withdrew in 1862, and S. N. Pike again continued the business on his account. In 1864, a new firm of S. N. Pike and Company was formed by S. N. Pike, one Joseph Tilney, and the appellant George W. Kidd, Tilney and Kidd having previously been employees of Pike. The business of the new firm was the same that had been previously carried on by the old firms, and by S. N. Pike individually; namely, that of manufacturing the Magnolia and other brands of whiskey under the same trade-marks. The business of manufacture had previously been carried on solely in Cincinnati; but on the formation of the new partnership in 1864, another house was opened in the city of New York, of which special charge was given to Kidd; and the business was thereafter carried on in both cities. (Record, pp. 27, 28, 36, 37, 48.)

At the time of the formation of the new partnership, S. N. Pike was the owner of the real estate on which the business was carried on in Cincinnati, and of all the fixtures on the premises used for the purpose of the business; and to both the real estate and the fixtures he retained the title, and the firm was to pay rent for the use of them. (Record, p. 109.)

In 1868, the firm, then composed of S. N. Pike and George W. Kidd, (Tilney having withdrawn in the mean time,) resolved to discontinue its house in Cincinnati, and to concentrate its business in New York; and on October 1, 1868, Pike individually sold the real estate and fixtures in Cincinnati to a firm designated as "Mills, Johnson & Company," of which the appellees, W. W. Johnson and Company, are the successors; and extended to them and their successors, by a memorandum in writing, the use of

all the brands formerly used by him in his Cincinnati house. (Record, pp. 112, 113, 110, 111, 96, 97.)

This license to use the brands was given without the assent or concurrence of Kidd, the other partner of the firm. (Record, p. 69.)

The business of S. N. Pike & Co., including the manufacture and sale of the Magnolia brand of whiskey, was continued in New York until the death of S. N. Pike in 1872. Thereupon, Kidd, as surviving partner, organized the firm of George W. Kidd and Company, and continued the business precisely as before. (Record, pp. 29, 30.)

The partnership articles, under which the firm of S. N. Pike & Co. was established, in 1864, provided for its continuance for three years, with an option of two years longer. (Record, p. 109.) But it was permitted to continue, by mutual acquiescence, as already stated, until the death of Pike. The affairs of the firm have never been fully settled; and there has been no accounting between Kidd and the heirs or personal representatives of Pike in respect to the matter of the trade-marks. (Record, pp. 44, 45.)

The firm of S. N. Pike and Company continued during its existence, and its successor, the firm of George W. Kidd and Company, has continued to the present day to manufacture the Magnolia brand of whiskey in New York, and to vend it wherever they could find a sale for it. The firm of Mills, Johnson and Company, and its successor, the firm of W. W. Johnson and Company, has done the same in Cincinnati. Disputes arose between them: negotiations for a settlement of their controversy proved abortive. The firm of Mills, Johnson and Company, under the act of 1870, registered the trade-mark, and another of similar character known as the "Dave Jones." George W. Kidd and Company attempted to do the same. An interference was declared in the Patent Office; and testimony was taken by the parties in support of their respective claims. The ex-

aminer of trade-marks in the Patent Office decided in favor of Mills, Johnson and Company. The Commissioner of Patents reversed the decision of the examiner, and sustained the exclusive right of George W. Kidd and Company to the use of these trade-marks. Both decisions are found in the Record. (Record, pp. 15–21.)

Dissatisfied with this decision, W. W. Johnson and Company instituted suit in the circuit court of the United States for the district of Louisiana to enjoin them from selling the Magnolia brand of whiskey under a license emanating from Geo. W. Kidd and Company; and the injunction was granted and made perpetual. The testimony in the case, by the agreement of the parties, is the same that was taken in the interference case in the Patent Office.

Kidd, having become a party to the suit, appeals from the decision. He filed an answer and cross-bill: and the purpose of the suit is to have a final decision of the question of ownership.

II.

ASSIGNMENT OF ERRORS.

1. The circuit court erred in awarding an injunction against the appellant and his licensees.

2. The circuit court erred in not awarding an injunction, as prayed in Kidd's cross-bill, against the appellees to restrain from the use of the trade-mark in question.

3. The circuit court erred in holding that W. W. Johnson and Company, as the successors of Mills, Johnson and Company, were the exclusive owners of said trade-mark.

4. The circuit court erred in holding that the appellant, George W. Kidd, as survivor of S. N. Pike and Company and George W. Kidd and Company, was not the owner of said trade-mark.

5. The circuit court erred in holding that the license given by S. N. Pike to Mills, Johnson and Company was valid as against said George W. Kidd.

6. The circuit court erred in holding that the license given by S. N. Pike to Mills, Johnson and Company, gave an exclusive right of ownership in the trade-mark to said firm.

7. The circuit court erred in not rendering a decree in favor of the appellant.

III.

BRIEF OF ARGUMENT.

The question in this case is as to the ownership of the "Magnolia" trade-mark. Is it the property of W. W. Johnson and Company, or that of George W. Kidd or George W. Kidd and Company, or the equal property of both?

1.

Both parties claim title from S. N. Pike; and Pike is admitted to have been the sole and exclusive owner in 1864, at the time of the establishment of the second firm of S. N. Pike and Company. Did he remain sole owner after that time? Or, did the trade-mark become the property of the firm? We submit that the trade-mark became the property of the firm.

The articles of co-partnership (Record, p. 109,) provided for the conduct by the firm of "a general whiskey business" in Cincinnati and New York,—the same business, of course, already carried on by S. N. Pike individually, and by the previous firms, including the manufacture of whiskey with the "Magnolia" and other brands. (Record, pp. 27, 43, 44, 96.) The brands and trade-marks were an essential part of

this business, and necessarily passed into the assets of the partnership, as they had already passed through the previous partnerships. It was only by a right of succession that the trade-marks had become the individual property of S. N. Pike; and when he sold out, in 1864, all his right, title, and interest in the business to the partnership of S. N. Pike and Company, it must be presumed that he sold the trade-marks which had become a necessary part of the busines.

Upon the principle that every deed is to be construed most strongly against the grantor, the co-partnership articles of 1864, which are in themselves a bill of sale of the business and of all the property employed in the business, except the real estate and fixtures, are to be construed as including the trade-marks and every other appurtenance of the business. It is very evident, that, if Pike had desired or intended to retain any individual ownership of the trade-marks, it was his duty to have specified such reservation; and the absence of such reservation is positive proof that he had no such intention. If he had made no mention of the "fixtures," and reserved no rent for them, would it not be a just conclusion that they also would have become part of the partnership property? If no rent had been reserved for the premises on which the business was conducted, would it not have been very doubtful, under the circumstances, whether rent could afterwards have been claimed? Kidd testifies, that the business purchased by the firm of S. N. Pike and Company from S. N. Pike would have been of no value without the benefit of the trade-marks, (Record, p. 27;) and Tilney says that the trade-marks were a valuable and essential part of the business, (Record, p. 44.) W. W. Johnson, one of the appellees, testifies very distinctly and positively, that, after the formation of the partnership of S. N. Pike and Company, in 1864, "the same business was continued by S. N. Pike & Co.;" and that "it embraced the same articles under the same brands." (Record, p. 96.) There is no evidence whatever that S. N. Pike had any intention to re-

tain his individual ownership of the trade-marks; and it is somewhat questionable whether he could very well have done so, even if he had wished. The conclusion, therefore, is inevitable, that they became part of the partnership property, and that such was the intention of all the parties to the articles of co-partnership.

This conclusion is in accordance with all the authorities on the subject of trade-marks.

In the case of Bury *vs.* Bedford, (10 Jurist, 503,) Vice-Chancellor Malins said: "upon the formation of a partnership with a person entitled to the benefit of a trade-mark, the trade-mark, in the absence of express provisions in relation to it, becomes an asset of partnership, the trade-mark being but one element of the trade."

In Hall *vs.* Burrows, (10 Jurist, 55,) it was held that a trade-mark could be properly sold with certain iron works, and that it constituted a part of the partnership assets.

In the case of the Leather Cloth Company, in the House of Lords, (11 Jurist, 513,) Lord Cranworth said, and all the Court agreed with him, "that the right to a trade-mark may, in general, treating it as property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used or affixed, and may be lawfully used by the purchaser."

In the case of Ainsworth *vs.* Walmesly, (44 L. J. R., 252,) Vice-Chancellor Wood said: "Inasmuch as the court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods."

In the case of The Joseph Dixon Crucible Company *vs.* Meyer Guggenheim *et al.*, in the court of common pleas of Philadelphia, in 1870, Judge Paxon, in an elaborate opinion, which has been universally accepted as a correct statement of the law of trade-marks, and is cited as such in all the text-books on the subject, after an exhaustive review of all the cases, said, in conclusion: "The true rule to be de-

duced from all the cases would appear to be this,—that the property or right to the trade-mark may pass by an assignment or by operation of law to any one who takes at the same time the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it can not exist, and so can not pass by an assignment, and descend to a man's legal representatives."

Joseph Dixon Crucible Co. *vs.* Guggenheim, 2 Brewster, 321.

Same case, American Law Times Rep., vol. 3, pp. 288, 299.

Sebastian on Trade-Marks, the latest English authority on this subject, lays down the law as follows: "A trade-mark is assignable and transmissible, but only in connection with the good-will of the business concerned with the goods or classes of goods to which it relates. A trade-mark can not exist in gross and unattached to specific articles; for, if that could be so, the mark might come to be an instrument of deception, instead of a guarantee of genuineness. In an assignment of the business and good-will, the trade-mark passes as a matter of course, or if specially excepted, must cease to be available by the vendor."

Sebastian on Trade-Marks, secs. 6, 55, 60.

Hall *vs.* Burrows, 33 L. J. Ch., 204.

Shipwright *vs.* Clements, 19 Weekly Rep., 599.

Leather Cloth Co.'s Case, 33 L. J. Ch., 199.

Dixon Crucible Co. *vs.* Guggenheim, 2 Brewster, 321.

Congress Spring Co. *vs.* High Rock, &c., Co., 57 Barbour, 526.

Congress Spring Co. *vs.* High Rock, &c., Co., 45 N. Y., 291, 302.

Brooks *vs.* Gibson, 34 Beavan, 566.
Bradbury *vs.* Dickens, 27 Beavan, 53.
Upton on Trade-Marks, p. 52.
Coddington on Trade-Marks, secs. 22, 23, 125, 148, 149.

2.

There can be no doubt, therefore, that, in 1864, S. N. Pike ceased to be the individual owner of the trade-mark in question, and the firm of S. N. Pike and Company became the owners of it. It follows, as a necessary consequence, that, in 1868, during the continuance of the partnership, Pike, individually, had no right to dispose of the trade-mark, and could give no title to Mills, Johnson and Company, or to any one else.

Neither could he, as a partner of the firm of S. N. Pike and Company, convey the right to any one to use the trade-mark, without the concurrence of his co-partner.

"The right to use a trade-mark is not an abstract right to which title can be acquired. It is only when such use is attached to or connected with some particular thing to which it is affixed as a designation of individual right in particular property, that the law will interpose to restrain its use by another."

Coddington on Trade-Marks, Secs. 22, 23, 125, 148, 149.
Congress Spring Co. *vs.* High Rock, &c., Co., 45 N.Y., 302.

A trade-mark is assignable only with the business to which it relates, and the good-will of that business.

Shipwright *vs.* Clements, 19 Weekly Rep., 599.

Therefore, only by a discontinuance of the business of S. N. Pike and Company, and the transfer of that business

by that firm to Mills, Johnson and Company, could the latter acquire any right in the trade-marks which were at the time the exclusive property of the former. There was no such discontinuance and no such transfer; and there could not be by the act of S. N. Pike alone. For while one partner may bind a firm, even against the will of his co-partners, by any act within the scope of the partnership business, he cannot do so by an act, the necessary consequence of which would be the destruction of the partnership.

Story on Partnership, Secs. 101, 102, 110, and cases cited.
Pierpont *vs.* Graham, 4 Washington C. C., 232.
Egberts *vs.* Wood, 3 Paige, 517.
Barton *vs.* Williams, 5 B. & A., 405.

But, even if S. N. Pike had actually intended to bind his firm and to transfer the partnership property, he did nothing to effect that intention. In order to bind a firm, the act proposed to be done must be done in the name of the firm; otherwise, they will bind the individual partner only who executes them.

Story on Partnership, Sec. 102.
Kent's Commentaries, Vol. 3, p. 41–44.

3.

An attempt is made, on behalf of the appellees, to show by oral testimony (see Testimony of W. W. Johnson, Record, p. 97; Joseph F. Mills, Record, p. 99; and Charles L. Moore, Record, p. 104) that S. N. Pike in 1868 sold the business and good-will of the Cincinnati house of S. N. Pike, or S. N. Pike and Company, to Mills, Johnson and Company. Such testimony is plainly inadmissible, inasmuch as the contract of sale from Pike is in writing, produced by Mills, Johnson and Company themselves. (Record, pp. 112, 113, 110, 111.)

But even if it were admissible, it would prove nothing, on the grounds already stated. Whatever sale was made, was made by Pike himself individually, and not in the firm name or with any pretense of binding the firm, and without any concurrence of his partner.

4.

What did Pike actually sell in 1868? Excluding the oral evidence already referred to, as of course it must be excluded, the whole evidence of the sale in question is found in the deed of the real estate in Cincinnati, from Pike to Mills, Johnson and Company (Record, p. 112, 113,) and in the bill of sale of the fixtures thereon signed by Pike (Record, p. 111.) This bill of sale mentions nothing whatever but the "fixtures." The good-will of S. N. Pike and Company was not sold. (Record, p. 92.) Most of the stock on hand at the time of sale was either sold to other parties, or removed to the New York house (Record, p. 92.) The property sold to Mills, Johnson and Company was precisely the same property that was leased to S. N. Pike and Company in 1864, as will readily appear by a comparison of the written instruments in both cases.

Under these circumstances, the attempt of Pike to extend to Mills, Johnson and Company the use of his brands, was entirely nugatory, and could confer no title. For this was in the language of the decisions already cited, an attempt to transfer an abstract right in the marks in question, and such a right had no legal existence.

5.

But even if Pike had the right, in 1868, by his individual act, to transfer the business and good-will of the Cincinnati house and the use of the trade-marks with them, to Mills, Johnson and Company, and his action could by any possi-

bility be construed into the execution of such a power, the sale cannot be construed into a grant of exclusive right, especially as against his partner and the firm of S. N. Pike and Company. And the utmost that the appellees could be entitled to in this case under any circumstances, would be a concurrent right to use the trade-mark in common with Kidd, such a right, of course, will not authorize an injunction against Kidd or his licensees.

6.

The appellees seek to show a kind of understanding between Mills, Johnson and Company, on the one hand, and Pike individually, on the other hand, to the effect, that the sale to Mills, Johnson and Company was intended to be of all the business, good-will, including trade-marks, &c., of the Cincinnati house, and ultimately of the entire business; and that Pike merely retained a license to use the trade-marks in the New York house until the expiration of the term specified in the articles of agreement for the partnership of S. N. Pike and Company (Record, p. 97, 100, 109.) Besides being exceedingly improbable in itself under the circumstances, and especially in the light of the fact that the firm of S. N. Pike and Company continued after the term so specified, whether by express or by implied agreement does not appear, and until its dissolution by the death of Pike in 1872, such an agreement would be void under the Statute of Frauds, as not to be performed within the year, and not put in writing.

The agreement for the sale from Pike to Mills, Johnson and Company, was negotiated in the summer of 1868 (Record, p. 97,) and was carried into formal effect on October 1, 1868 (Record, p. 97, 111.) By the testimony of Johnson, it appears that the exclusive ownership of the brands, as claimed by his firm, was not to vest in it until Pike "retired from business," or until the end of the term

of the partnership of S. N. Pike and Company (Record, p. 97, 106,) which, according to the articles of co-partnership of that firm, would be the 15th of October, 1869.

7.

It is entirely unnecessary, in the present case, to inquire as to the ownership of these trade-marks after the dissolution of the firm of S. N. Pike and Company by the death of S. N. Pike in 1872. Whether they became the exclusive property of Kidd as the surviving partner, or whether the personal representatives or heirs-at-law of Pike had any interest in them, is a question entirely between Kidd and those heirs or representatives. The authorities on the subject seem to be in favor of the surviving partner in such instances.

Lewis *vs.* Langdon, 7 Simons, 421.
Croft *vs.* Day, 7 Beavan, 84.
Hine *vs.* Lart, 10 Jurist, 106.
Edlestone *vs.* Vick, 23 Eng. Law and Eq. Rep., 51.

In any event, he is either the owner in his own right, or as surviving partner in trust; and whichever be his character, no third party can question his right.

8.

In conclusion, it is respectfully submitted, as a demonstrated conclusion of law, that the decree of the circuit court was erroneous; and that the injunction against the appellant should be dissolved, and a permanent injunction awarded on the cross-bill against the appellees.

R. T. Merrick,
M. F. Morris,
Of Counsel for Appellant.

OFFICE SUPREME COURT U.S.
FILED
APR 6 1880
D. W. MIDDLETON, Clerk.

Robert Clarke & Co., Printers, Cincinnati, O. [*March*, 1880.

SUPREME COURT OF UNITED STATES,

OCTOBER TERM, 1879.

George W. Kidd,

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Appellees.

Brief of HOADLY, JOHNSON & COLSTON,

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STATEMENT OF FACTS.

The record in this case discloses the following facts: In 1849, S. N. Pike, then doing business in Cincinnati as a wholesale dealer in whisky, adopted as a trade-mark the following device or combination of words: "S. N. Pike's Magnolia Whisky, Cincinnati, Ohio," which was used as a brand on barrels containing whisky manufactured by him at his place of business in Cincinnati.

Between the years 1849 and 1863, Pike had several different partners, and in the business carried on by these various firms the brand in question was used. In the last-

mentioned year, though doing business in the firm name of S. N. Pike & Co., he had no partner. In October, 1864, Pike admitted into partnership with himself two of his former clerks, Joseph Tilney and Geo. W. Kidd, the style of the firm continuing as before, a branch of the business being opened in New York city.

The copartnership articles entered into between the parties named (Record, p. 109, Exhibit 1) are silent on the subject of the trade-mark in question, and there was no agreement as to it, either at the time of the formation of the partnership or subsequently. (Tilney's testimony, Record, p. 45, answer to cross-interrogatory 18.)

At the date of the formation of the partnership, and for many years prior thereto, Pike was the owner of the real estate in Cincinnati in which said firm continued to do business, and also of the distillery, fixtures, etc., situated thereon, and remained the sole owner thereof till its sale to Mills, Johnson & Co., in 1868.

In the year last-named, the firm of S. N. Pike & Co. removed its business wholly to New York City, Pike contemporaneously selling to Mills, Johnson & Co., who were also engaged in the whisky business in Cincinnati, the real estate in question (Record, p. 112), the consideration expressed in the deed therefor being $100,000, and also

"all the stills, tubs, engines, boilers, and tubing, together with all the apparatus used in my distillery" (Record, p. 112),

by a separate instrument, $25,000 being named as the consideration for same. On the same day (October 1, 1868),

and as part of the transaction, Pike executed and delivered to Mills, Johnson & Co. an instrument in writing of which the following is a copy (Record, p. 111):

"Having sold to Messrs. Mills, Johnson & Co. my premises No. 18 and 20 Sycamore street, I hereby extend to them and their successors the use of all my brands formerly used by me in my Cincinnati house.

(Signed), SAM'L N. PIKE.

CINCINNATI, October 1, 1868."

Mills, Johnson & Co., as suceessors to S. N. Pike & Co. in Cincinnati (Record, p. 96, Question 16), continued the whisky business in the premises thus purchased, and used without question the trade-mark now in controvesy largely in the transaction of their business (Record, pp. 30, 31, testimony of Geo. Kidd, Cross-Interogatories 50, 51), whilst S. N. Pike & Co. attempted not to use the brand themselves on whiskies put up in New York, but on whiskies manufactured at Cincinnati, and then only to a limited extent. (Record, p. 31, Kidd's testimony, Cross-Interrogatories 54–56.)

To this use of the brand by S. N. Pike & Co., S. N. Pike objected, and assigned as a reason his sale to Mills, Johnson & Co. (Record, p. 31, Kidd's testimony, Cross-Interrogatory, 57.)

Brands other than "Magnolia" used as trade-marks by S. N. Pike and S. N. Pike & Co. in their Cincinnati business were transferred to Mills, Johnson & Co., notably, "Dave Jones," by the instrument which we have heretofore set forth.

The use of the "Dave Jones" brand led to a contro-

versy by letter between the parties. The correspondence is set forth fully in the record herein (pp. 82, 83, 84). To the letter from S. N. Pike & Co., dated, New York, November 11, 1870 (Record, p. 82), we shall have occasion to refer more particularly hereafter.

In 1872, S. N. Pike died, and his surviving partners, George W. Kidd and Isaac Bristow, formed a new partnership, as Geo. W. Kidd & Co., which firm was subsequently dissolved, and Geo. W. Kidd succeeded to its business. (Record, p. 13.)

W. W. Johnson & Co., having succeeded Mills, Johnson & Co., by agreement herein (Record, p. 15), it is conceded that they are entitled to all the rights to the trade-mark in controversy which the firm of Mills, Johnson & Co. possessed.

In November, 1876, W. W. Johnson & Co., having discovered in New Orleans various lots of whisky bearing the trade-mark, "S. N. Pike's Magnolia Whisky, Cincinnati, O.," not manufactured by them, but by Tyra, Hill & Co., of St. Louis, Mo., in the possession of Scherk & Berkson, and other dealers in said city, filed their bill in equity in the Circuit Court of the United States in and for the Fifth Circuit and District of Louisiana, setting forth fully their title to said trade-mark, and praying, among other things, for an injunction against defendants named in said bill, against their buying, selling, or trafficking in whisky not manufactured by W. W. Johnson & Co., bearing on the packages in which the same was contained the said trade-mark, and for other equitable relief (Record, p. 1), and on the 21st of

November, 1876, an injunction *pendente lite* was issued, as prayed for, against said defendants.

Subsequently, on December 27, 1876, complainants below filed an amendment to their bill, by leave of Court, making George W. Kidd, appellant herein, a party defendant, setting forth, among other things, that said Kidd, as survivor of said S. N. Pike, claimed the ownership of said trade-mark, and the right to license said Tyra, Hill & Co. in the use of the same. And on the same day said Kidd filed his answer and cross-bill herein, asserting fully said title, and setting forth that Tyra, Hill & Co., were acting under license from him. By agreement between the parties to the controversy (Record, p. 15), the answer and cross-bill of said Kidd was taken and treated as the answer and cross-bill of all the defendants to said original bill, and

"to avoid unnecessary litigation it was agreed that this case should be considered a test case to settle the questions whether W. W. Johnson & Co. or G. W. Kidd have the exclusive right or the joint right to the use of the brands mentioned in the bill, and whether the party having the right can assign to others the right to manufacture the same article, and to affix thereto the same trade-marks."

Mills, Johnson & Co. and George W. Kidd & Co., having had two cases of interference, upon application made by the parties respectively to the commissioner of patents for the registration of the trade-marks, "Magnolia" and "Dave Jones," it was further agreed between the parties that the testimony which had been submitted on either side in those cases should be used so far as the same might be

competent in the hearing of this case (Record, p. 15), and the said testimony is fully set forth in the record herein.

Upon final hearing in said Circuit Court, the equities were found with complainant, and by decree the injunction *pendente lite* was made perpetual. From which said decree said Kidd has appealed to this Court.

ARGUMENT.

I.

The first, and perhaps the most important, question that presents itself for determination in the discussion of the case at bar, is: What right, as to the trade-mark in controversy, did Mills, Johnson & Co. acquire by the instrument executed by Pike, and delivered to them October 1, 1868, contemporaneously with the sale and delivery of the real estate and distillery fixtures belonging to him, but occupied and used by S. N. Pike & Co., in the transaction of the firm business in Cincinnati?

We concede, at the outset, that Pike did not, nor could he, transfer a greater interest in the trade-mark and brands alluded to in that instrument, than he himself then possessed. But, our contention is that he was then, and always had been, and continued to be, if any rights remained in him after the sale to Mills, Johnson & Co., which we shall discuss hereafter, the sole and exclusive owner of them.

It is unnecessary to consider how Pike himself derived his title, as the parties to the controversy all claim through him. Were it otherwise, the testimony abundantly establishes the fact that, at the date of the formation of the partnership, in 1864, between Pike, Tilney, and Kidd, the former was the exclusive owner of the trade-mark, "S. N. Pike's Magnolia Whisky, Cincinnati, O."—in fact, no one, as yet, has ever controverted his ownership thereto.

The partnership articles between the partners named contain no allusion to trade-marks or brands. (Record, p. 109.) Pike was the capitalist of the concern, as is shown by provision made in the partnership agreement for payment to him of interest on surplus capital, and by Tilney's testimony. (Record, p. 43, Interrogatory 3.) Tilney and Kidd had been, and were at that date, clerks in his employ. Nothing was paid to Pike, by the new firm, nor by its individual members, nor was any credit given to him in the new partnership, for the value of the trade-mark in controversy, nor, indeed, for any of his brands, though the new firm continued their use, without objection on his part.

Tilney, one of the partners, called as a witness by appellant, testifies (Record, p. 44):

"*Cross-Int.* 14. Were any of the partnership funds ever used in purchasing either of said trade-marks?

Ans. No.

Cross-Int. 15. Did you, or Mr. Kidd, to your knowledge, ever pay any thing to Mr. Pike for said trade-marks, or either of them?

Ans. No."

Nor was title or interest in the trade-marks conveyed

by Pike to the new firm by any other instrument, if not by the copartnership articles. (Record, pp. 44, 45, Tilney's testimony, Cross-Interrogatories 16, 19.) So that, whatever rights either Tilney, Kidd, or the firm of S. N. Pike & Co. acquired, to the exclusion of Pike's sole ownership, was, by operation of law, by virtue of their partnership relations.

And, in this connection, it becomes a matter of great importance to consider how the parties themselves treated these trade-marks, in their relations towards each other.

Mr. Tilney was the second man in the firm; had charge of its finances and office business (Record, p. 45, Cross-Interrogatories 23, 24); had a much larger interest in the profits than Kidd, and had contributed $50,000 to its capital. He retired from the partnership in October, 1867; and yet, neither during the existence of the firm, nor when he retired therefrom, did he either claim any ownership in the trade-marks, or did he receive any thing on account of their value, when the partnership was dissolved.

He testifies (Record, p. 45):

"*Cross-Int.* 21. Did you, as a member of the firm of S. N. Pike & Co., or individually, ever claim any title in either of said trade-marks?

Ans. No; the question was never mooted when I was in said firm.

Again, Tilney testifies (Record, p. 47):

"*Cross-Int.* 41. When you retired from the firm of S. N. Pike & Co., did you receive, or claim to receive, any thing on account of either of said trade-marks?

Ans. No."

And in this Mr. Tilney is corroborated by the evidence of W. R. Williamson, who was the bookkeeper of the concern, who testifies (Record, p. 9):

"*Ques.* 16. State what settlement was made with Tilney, on his retiring from the firm, in 1867, and whether it embraced any allowance to him for any supposed interest of his in the brands and trade-marks used by the firm, and originally belonging to Mr. Pike.

Ans. Mr. Tilney retired, taking his share of the profits, agreeable to the terms of the copartnership. No mention or account was made of brands or trade-marks in the settlement."

And yet, at this date, these trade-marks were of great value. The witnesses, W. W. Johnson, J. F. Mills, G. H. Brooks, David Gibson, and C. L. Mills, variously estimating the same at between $50,000 and $75,000.

That Pike did not, as matter of fact, assign or transfer to S. N. Pike & Co., nor intend to do so, any interest in these trade-marks, is clearly demonstrated by the fact that when the partnership was formed, he being then the sole owner of the real estate, fixtures, brands, trade-marks, etc., an inventory and account of stock was taken of such assets as he then had on hand, and which were to go to his credit, and be by him contributed to the new firm. *The brands and trade-marks then belonging to him were not included therein.*

Williamson testifies (Record, pp. 90, 91):

"*Ques.* 12. At the time of the formation of the firm of S. N. Pike & Co., in October, 1864, who was the owner of the real estate, fixtures, good will, brands, and trade-marks subsequently used by the firm?

Ans. Samuel N. Pike.

Ques. 13. At the time that firm was formed and organized, state whether an account of stock was taken; and, if so, what it embraced.

Ans. It was taken, and embraced all the liquors on hand, in its various shapes, cooperage, coals, paints, essential oils, transfers of policies, with insurance on goods, office furniture, such as desks, letter-presses, etc., and any thing found necessary in the manufacture of liquors, that was on hand, such as berries, coloring matter, etc.

Ques. 14. Whose property was this, and who received credit for it on the books of the firm?

Ans. Samuel. N. Pike.

Ques. 15. State whether this account embraced any brands or trade-marks, or whether, in any other form, Mr. Pike received credit, for any amount, as the value of any such.

Ans. According to my recollection, no brands or trade-marks were enumerated in the invoice. There never was any entry made in reference to any brands or trade-marks, in the books of S. N. Pike & Co., to the credit of S. N. Pike."

And, on this subject, Tilney testifies (Record, pp. 48, 49):

"*Cross-Int.* 8. At the formation of the partnership, was any inventory made of the assets or property which S. N. Pike put into the business?

Ans. Yes; an inventory of the stock on hand was made at the time. *I mean the property that S. N. Pike put into the concern.*

Cross-Int. 10. Were the Magnolia and Dave Jones trade-marks included in that inventory?

Ans. I think not.

Cross-Int. 11. Did Mr. Pike put into the firm any property except what is mentioned in this inventory?

Ans. No; I think not."

That Pike did not intend to divest himself of his individual ownership of these trade-marks, or did not think that he had so done, by the formation of his partnership with Tilney and Kidd, is conclusively shown from the language of the instrument delivered by him to Mills, Johnson & Co., in which he writes:

"* * * *I* hereby extend to them, and their successors, the use of all *my* brands, formerly used by *me* in *my* Cincinnati house."

Strange words to be used by an exact and successful business man, concerning property not his own.

That the New York firm of Samuel N. Pike & Co., composed then of Pike and appellant, Kidd, did not claim, as late as November, 1870, that Pike was not the owner of the brands and trade-marks, in 1868, and that Kidd is now estopped from so asserting, is evidenced by letter from Samuel N. Pike & Co. to Mills, Johnson & Co., which is as follows (Record, p. 82):

"NEW YORK, November 11, 1870.

MESSRS. MILLS, JOHNSON & CO.

DEAR SIRS: We understand that you are using an exact copy of the inclosed, with your signature on the Dave Jones brand of whisky. This is an infringement which we can not permit, as you have no right to use it. *Mr. Pike did not have this addition when he gave you the use of his brands.*

* * * SAMUEL N. PIKE & CO."

Again, on November 21, 1870, they write:

"* * * We send you an abstract of the agreement with you and Mr. Pike, which is short and simple, and easily understood: 'Having sold to Mills, Johnson &

Co. my premises, Nos. 18 and 20 Sycamore street, I hereby extend to them the use of all my brands, formerly used by me in my Cincinnati house.'

SAMUEL N. PIKE & Co."

As matter of fact, then, we think that we may fairly assume from the testimony disclosed by the record that S. N. Pike was, on the 15th of October, 1868, the sole owner of the trade-mark in question. Was he so as matter of law? He certainly was, unless by operation of law the title to the trade-mark vested in the new firm of S. N. Pike & Co., by the mere act of its formation in 1864. Upon what principle it can be claimed that one entering into a partnership loses his title to property solely his own, without either any agreement or intention so to do, or without being paid therefor, we must confess that we do not know. Certainly not by simply permitting the partnership to use his individual property for the firm benefit. Supposing, for the sake of the argument, Pike had been the owner of teams, which he permitted to be used in the transportation of merchandise dealt in by the firm, would they thereby have become firm property? Or, if being the owner of a patented process for the manufacture of whisky, instead of a trade-mark, he had formed a partnership with Tilney & Kidd, and permitted the firm to use the same, would the partnership as such have acquired any interest in the patent?

We apprehend that our learned adversary would make no such claim, and yet a trade-mark is as much property as either horses or a patent.

"We accordingly find that property in trade-marks, exclusive and absolute, has existed and been recognized as a legal possession, which may be bought and sold and transmitted, from the earliest days of our recorded jurisprudence."

Upton on Trade-Marks, 10.

See also *Manufacturing Co.* v. *Hall*, 61 New York, 226–230.

The case of *Taylor* v. *Bothin*, 8 Reporter, 516, decided in the Circuit Court of the United States for the District of California, sustains fully the proposition that one owning a trade-mark entering into a business connection with another, still retains his ownership, not for joint benefit, but for his individual use. Taylor had discovered a process for making yeast powder, and had, without adopting a trade-mark for the same, entered into a business connection with Bothin for its manufacture and sale, and they jointly put it on the market as "Mrs. Mills Cream." Afterwards, Bothin secretly had this trade-mark registered as his own, and Taylor. upon discovering the same, filed his bill in equity, asking that the trade-mark be adjudged his property, etc.

Mr. Justice Field, of this Court, in announcing the opinion in that case, uses the following language:

"The only serious question for deliberation is, whether the complainant is entitled to the exclusive use of the

trade-mark, or only to a joint or equal use of it with the defendant. *Had the name been suggested and used by the complainant before the business connection with the defendant, there would have been no doubt of his exclusive right to it.*"

Pike then being the sole owner of the trade-mark in question, we maintain that by the writing of October 1, 1868, hereinbefore recited, he either conveyed to Mills, Johnson & Co. his entire interest therein, or conferred upon them an irrevocable license to use the same.

It must be confessed that the language used in the writing itself leaves its meaning somewhat ambiguous, but looking at the surrounding circumstances, it seems to us that all difficulties of understanding are cleared away.

It must be remembered that the firm of S. N. Pike & Co. had closed its business in Cincinnati and removed to New York; that Pike had sold to Mills, Johnson & Co. his real estate and the fixtures, etc., pertaining to the distillery; *and that the assignment of the brands was written at the bottom of the sheet of paper, upon and above which was written the conveyance of the distillery fixtures.* (Record, p. 94, Cross-Interrogatory 42.)

Williamson testifies explicitly that this sale to Mills, Johnson & Co. closed up completely the business of S. N. Pike and S. N. Pike & Co. in Cincinnati. (Record, p. 91, Questions 22, 23.)

Again, Mills, Johnson & Co. were to continue their business, which was exactly of the same character as that

carried on by S. N. Pike & Co. at the old stand, using precisely the same agencies and appliances that had been previously used by the last named firm.

But more conclusive than all this is the positive evidence offered in support of their claim by appellees.

This testimony shows that Pike, when he sold out, stated that he intended to continue in business but a year, or, at most, eighteen months longer. (Record, p. 107, Question 3.) And that at the date of the purchase by Mills, Johnson & Co. they conceded to him the right to use the brands in question for that length of time (Record, p. 106, Question 2, p. 97, Question 24, p. 100, Question 13), with the full agreement and understanding that at the expiration of that time they should become the exclusive property of Mills, Johnson & Co.

W. W. Johnson testifies (Record, p. 97):

"*Ques.* 24. State whether or not, at the time of the delivery of the deed and bill of sale of this property by Mr. Pike, in consummation of this purchase, any conversation took place between you and him in reference to the title and ownership and future use of the trade-marks previously used by him and the firm of S. N. Pike & Co. If so, state when and where it occurred, who was present, and what was said on that subject.

Ans. There was; in the office of our premises at the time the purchase was made or the deed passed. Mr. Joseph Mills was present. I said: 'Now, Mr. Pike, I want to ask you one question.' (This is the precise language.) 'Who owns these brands exclusively when you retire from business and are done with them?' His answer was: 'Mills, Johnson & Co., and you may do what you are a mind to with them.' That was his precise language and words."

Mr. Joseph F. Mills testifies (Record, p. 100, Question 13):

"*Ques.* 13. State what, if any thing, was said on that occasion by yourself, Mr. Johnson, and Mr. Pike, in reference to the title and ownership and future use of the trademarks previously used by S. N. Pike and S. N. Pike & Co.

Ans. * * * Mr. Johnson asked Mr. Pike, as Mr. Pike remarked at that time that he wished to make use of the brands (that is the same brand that he sold to Mills, Johnson & Co.) for twelve months, at his New York house, as he then proposed retiring from business. He asked the use of the brands simply as a privilege, not as claiming any ownership. Mr. Johnson asked Mr. Pike who was the owner of those brands at the end of the twelve months. He replied back: 'You are the exclusive owner by purchase, and if you do not protect them it is your own fault.'"

Let us now apply the rule of interpretation to the writing in question, laid down by this Court in *Chicago* v. *Sheldon*, 9 Wallace, 50–54, that

"in cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling interest."

Kidd himself testifies that S. N. Pike & Co. attempted to put up the "Magnolia whisky," only to a very limited extent, at Cincinnati; and then that Pike objected, because he said:

"That having sold his real estate to Mills, Johnson & Co., he thought we should not interfere in Cincinnati in the manufacture."

In 1869, some trouble having arisen between the parties concerning the use of the "Dave Jones" and "Magnolia" trade-marks, Mills, Johnson & Co. sent a representative to New York, C. L. Moore, to confer with S. N. Pike and S. N. Pike & Co., concerning same. Moore testifies (Record, p. 104):

"*Ques.* 3. State if at any time you had a conversation with the late S. N. Pike, touching the rights of Mills, Johnson & Co. in the "Dave Jones" and "Magnolia" trade-marks; if so, state fully the time and place of such conversation, the circumstances under which it was had, and all that was said.

Ans. Yes, I did, at their office in New York in 1869. I was sent there by Mills, Johnson & Co., touching the matter. I represented to S. N. Pike & Co. (Mr. Pike and Mr. Kidd were both present) that they were using these brands, which they had purchased of Pike & Co., to their detriment in trade, and the object of that visit was to have an understanding with them as to why they were using them, after having sold the right to use them to Mills, Johnson & Co. I stated to Mr. Pike and Mr. Kidd the complaint that Mills, Johnson & Co. made, which was their unauthorized use of these brands. *Mr. Pike stated that it was true that he had sold these brands for a valuable consideration, and he thought Mills, Johnson & Co. were right in their demand that their use should be discontinued by the New York house of S. N. Pike & Co.* * * *"

It is true that Kidd denies such statements being made in his presence, though he admits that a conversation did, at that time, take place concerning these trade-marks (Record, p. 68, Interrogatories, 12, 13), between Moore, Pike, and himself.

Kidd endeavors, by his own testimony, to cast a cloud

over the evidence of Moore, by describing him as a drunken, dissolute man. Be that as it may, no attempt has been made to impeach him generally, or to attack his reputation for truth. All drunkards are not liars, nor all liars drunkards. Moore had no incentive to testify falsely, has no interest whatever in the subject-matter of the controversy. Kidd has both.

M. H. Schwazenberg also testifies that, in the spring of the year 1872, at the solicitation of Mills, Johnson & Co., in whose employ he then was, he called on Pike in New York, in reference to the illegal sale of the "Dave Jones" and "Magnolia" brands of whiskies by outside parties, and was informed by him that as the brands belonged to Mills, Johnson & Co., they were the proper parties to stop such sales. (Record, pp. 85, 86, Question 3.)

Whilst it may be truthfully said that, in the correspondence which took place between Mills, Johnson & Co. and S. N. Pike & Co. (Record, pp. 82, 83, 84), the *firm* did assert a right to use the old Pike brands, more particularly that of "Dave Jones," to which they had made an addition, we challenge counsel for appellant to show a single instance, either by correspondence, action, or spoken words, in which Pike *individually* made any claim to these trademarks, or disputed the exclusive ownership of the same in Mills, Johnson & Co. On the contrary, whenever the subject was broached, he invariably recognized the fact that they were the property of Mills, Johnson & Co.

If, then, we are permitted to construe the indefinite and ambiguous language of the writing of October 1st,

either by the contemporaneous facts and circumstances, or by the acts of the parties themselves thereafter, can there be any doubt but that Pike thereby conveyed, and intended to convey, to Mills, Johnson & Co. his entire title to the trade-marks in question? We apprehend not. The very nature of the transaction between Pike and Mills, Johnson & Co. negatives any other idea than that Pike intended to convey, and did convey, to Mills, Johnson & Co., the exclusive use of the trade-mark "S. N. Pike's Magnolia Whisky, Cincinnati, O.," and the words used in the instrument itself, taken in connection therewith, can support no other honest construction.

Pike had sold to them his place of business and the apparatus for conducting it. The firm, S. N. Pike & Co., had ceased to do business in the city of Cincinnati, and removed permanently to New York. The trade-mark in question, though valuable to him and to the partnership whilst conducting their trade in Cincinnati, was valueless to them in New York, and in the use of which there, they were not entitled to the protection of the law, because, when stamped upon whiskies manufactured in New York, it was an imposition and fraud upon the public. Why then should either he or they desire to retain it in whole or in part?

The value of a trade-mark is solely in the right to use it, and when Pike extended to Mills, Johnson & Co. "*and their successors,*" *the use* of all brands *formerly* used by him in his Cincinnati house, he parted with, and gave to them

and their successors, all that there was of commercial value in the trade-marks in question.

Again, the use of the words "formerly used by me in my Cincinnati house," is extremely suggestive. Pike had closed his business in Cincinnati. Mills, Johnson & Co. were his successors. Remembering that upon the very paper on which he had written the sale and transfer of his distillery property, and the appliances for carrying on the business, which he and S. N. Pike & Co. had theretofore conducted, he wrote the conveyance of these trade-marks, using the words quoted above—their significance becomes more apparent—"*formerly* used by me;" not a present use; not a joint use, nor a reservation of a future use, but a clear expression of intended present and future abandonment, so far as he was concerned.

We think that we have shown clearly that Pike was the sole owner of the trade-mark in controversy at the date of the sale to Mills, Johnson & Co.; that he then conveyed to them his entire interest therein, and that the same now is the property of their successors, these appellees.

If Pike was such owner at that date, if it should be held by this Court that he did not convey his entire interest to Mills, Johnson & Co., it will hardly be contended, that Pike did not "extend" to them and their successors an irrevocable license to the use of the trade-marks.

Ownership conceded in Pike, there can be but two constructions given to the writing in question, viz., entire conveyance of all right and title to Mills, Johnson & Co.,

or irrevocable license to use the same to them and their successors.

II.

If this Court arrives at the conclusion that Pike, in October, 1868, was the sole owner of the trade-mark in question, and conveyed, at that date, his entire interest to Mills, Johnson & Co., further investigation is rendered unnecessary. If, however, on the other hand, it should be determined that although Pike was such sole owner at the date mentioned, but that he simply granted to Mills, Johnson & Co., and their successors, the right to use these brands, it then becomes proper to inquire as to the respective rights of the parties hereto therein.

We contend that appellant, Kidd, has neither title nor interest in the trade-mark in controversy. It is unnecessary for us to reiterate what we have already said upon the proposition that mere partnership relations do not divest a member of a firm of his individual ownership of a trade-mark, belonging to and used by him prior to the formation of the partnership, and vest the title thereto in the firm, when the inventory of assets contributed by such partner is silent as to such trade-marks.

We have already shown that, as a matter of fact, prior to October, 1868, Pike never parted with his ownership in this trade-mark. Did he subsequently?

The firm of S. N. Pike & Co., composed of S. N. Pike and Geo. W. Kidd, continued from the date of the with-

drawal of Tilney, in 1867, until 1872, when Isaac Bristow was admitted into the firm, and the partnership so remained until its dissolution by the death of the senior partner, in December of that year (Record, p. 2, Interrogatory 6), when the surviving partners formed a new firm, under the style of George W. Kidd & Co.

New partnership articles were not entered into on the withdrawal of Tilney. There was no written agreement between Pike and Kidd. (Record, p. 29, Interrogatory 26.) Nor does the testimony disclose the terms of any written articles of copartnership, if any there were, between Pike, Kidd, and Bristow.

Kidd, it is true, claims that the firm of S. N. Pike & Co., as it existed prior to January, 1872, under the item of "distillery fittings," in an inventory taken of the articles, conveyed to the new firm then formed, the trade-mark in question. (Record, pp. 34, 35, Interrogatories 80, 81.)

Tilney, however, testifies that he has the original of this inventory, made January 15, 1872, and that it nowhere mentions the trade-marks. (Record, pp. 55, 56, Interrogatories 4, 5, 6, 7, 8, 9, 10.) Nor can we conceive why it should. The trade-marks were then, as they always had been, Pike's individual property, and S. N. Pike & Co., conveying to the 1872 firm of the same name, would not certainly, nor did they, attempt to transfer trade-marks in which they had no interest, and to which they had no title.

Kidd certainly must be hard driven for expedients, when he attempts to convince any one of common sense that the trade-marks were included in the term "distillery

fittings." He says it was so understood. One's understanding is at all times a difficult thing to arrive at. He gives neither in detail nor in general, any conversation or written communication with Pike upon this subject; and, instead of furnishing any data by which the Court could arrive at a conclusion as to what understanding, if any, there was between the parties, contents himself by saying simply "it was understood."

But whether "it was understood" or not, can be best ascertained by the subsequent conduct of appellant. Certainly he would not be guilty of attempting to cheat the estate of his dead benefactor. Oh no, certainly not. So we find (Record, p. 38, Interrogatories 25, 26) that an inventory was made, after the decease of Mr. Pike, of the distillery, etc., and that the trade-marks and brands were included, not *as* "distillery fittings," as before, but *in* "distillery fittings;" that it was made immediately after Pike's death (Record, p. 39, Interrogatory 44); and that the same is in the hands of his executors. (Record, p. 39, Interrogatory 45.)

Mr. Tilney, the managing executor of the Pike estate, on the contrary testifies (Record, p. 45, Interrogatory 20) that—

"no inventory of the late firm of S. N. Pike & Co., as composed of Mr. Pike, Mr. Kidd, and Mr. Bristow, has ever been made."

So, at last, the claim that the firm of 1872 acquired from its predecessor any interest in these trade-marks must rest in what Kidd testifies "he understood," namely, that

they were included in the inventory in "distillery fittings." Rather a doubtful story, when taken in connection with his own statement, that all the "distillery fittings" were valued, as condemned materials, at $15,000, when we have shown that these trade-marks alone were worth from $50,000 to $75,000. As "condemned material," we doubt greatly whether the mere copper brands of the trade-mark in question were worth $10.00

We take it, therefore, that neither the firm of 1872 nor Kidd acquired any greater title to these trade-marks than the former firm had. "Nothing to nothing makes nothing." As it had none, so with its successors. Whatever title Pike had after October, 1868, he retained down to the date of his death, and it still remains in his legal representatives. It never has vested in Kidd.

If, however, this Court shall determine that merely an irrevocable license to use the trade-mark in question vested in Mills, Johnson & Co, and that Kidd is the possessor of whatsoever title remained in Pike thereafter, we still contend that the injunction granted in the case at bar was properly allowed.

The original and amended bill of complainant sets forth that the trade-mark, "S. N. Pike's Magnolia Whisky, Cincinnati, Ohio," is being and has been affixed by Tyra, Hill & Co., of St. Louis, Mo., to packages of whisky manufactured by them at that place.

Appellant, in his answer, admits the fact to be true, but avers that

"he did by agreement, in the month of October last, ex-

tend to Tyra, Hill & Co., of St. Louis, the right to make and vend said whisky in the City of St. Louis, and in the southwest, and to use upon the packages of said whisky said brand and trade-mark. All of which doings the defendant asserts and alleges were legal and proper for him to do."

Where and how did appellant acquire the right, either legally or otherwise, to license a fraud upon the public? The whisky manufactured by Tyra, Hill & Co., at St. Louis, was not "S. N. Pike's Magnolia Whisky, Cincinnati, O.," because it was neither made by S. N. Pike nor his successors, nor was it manufactured at Cincinnati, O. Nor could Kidd's license give them the right so to brand their whiskies.

In *Leather Cloth Co.* v. *The American Leather Cloth Co.*, 11 Jurist. N. S. 513, it was expressly held that:

"Though a man may have a property in a trade-mark in the sense of having a right to exclude any other trader from the use of it in selling the same description of goods, *it does not follow that he can, in all cases, give another person a right to use it or to use his name, because he can not give them the right to practice a fraud upon the public.*"

The very object of the license by Kidd to Tyra, Hill & Co. was to enable them to impose an article of their own manufacture at St. Louis as one made by another at Cincinnati. The trade-mark in question, branded on packages of their whisky, was a cheat and deception, and so intended by them. Its sole value was simply the opportunity which it afforded them to palm a lie off on the consumer and the business public.

Kidd could legally grant no such license to Tyra, Hill & Co.; nay, further, he could not affix the brand to whiskies manufactured by himself in New York, even though possessed of the title claimed by him herein, and be legally protected in such use.

It is the well-settled law of trade-mark, that one will not be protected in the use of a trade-mark which on its face contains a misrepresentation.

Partridge v. *Menck*, 1 How. App. Cases, 558.
Fetridge v. *Wells*, 13 How. Pr. R. 385.
Hobbs v. *Francais*, 19 How. Pr. R. 567.
Phalon v. *Wright*, 5 Philadelphia, 464.
Curtis v. *Bryan*, 36 How. Pr. R. 33.
Palmer v. *Harris*, 60 Penn. St. 156.
Pidding v. *Howe*, 8 Sim. 477.
Perry v. *Truefitt*, 6 Beav. 66.
Leather Cloth Co. v. *Am. Leath. Cloth Co*, 11 Jur. N. S. 513. Laird v Wilder 9 Bush 131, Seabury v Grosvenor 14 Blatchf 262.

We presume that in these latter days we may take it for granted, as a matter of common if not judicial knowledge, that whisky obtains its reputation, and thereby its commercial value, from the locality of its production. Mr. Pike understood this to its fullest extent. He did not content himself by adopting as a trade-mark the words "S. N. Pike's Magnolia Whisky," which would have been all-sufficient to indicate that he was its manufacturer, but he added "Cincinnati, Ohio," so that those who purchased and dealt in it would have a guaranty that the article so branded was "Cincinnati rectified." Cincinnati, then as now, being

the largest whisky market in the world, and its "rectified" standing at the head of all other whiskies of that description.

We say, therefore, that the use of the trade-mark in question, by Kidd himself, on packages containing whisky rectified in New York, would be an imposition and fraud upon the public, and without the pale or protection of the law.

But it may be urged that appellees herein are guilty of like fraud, in holding out that their rectified whisky is "*S. N. Pike's* Magnolia," when, in fact, it was not manufactured by him.

It must be remembered that Mills, Johnson & Co., to whose rights appellees have succeeded, were, so far as place of business, brands, distillery, and appliances were concerned, the successors of S. N. Pike. Their use of his trade-mark, then, so far as his name was concerned, was simply a holding out to the public, under such circumstances, not that the whisky was of the actual manufacture of Pike in person, but that the same was rectified according to his process, at his old place of business, and by the aid of the appliances formerly employed by him.

The rule in such cases is well stated by Lord Cranworth, in *Leather Cloth Co.* v. *American Cloth Co.*, *supra*, who said:

"But I further think that the right to a trade-mark may, in general, treating it as property, or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by

the purchaser. Difficulties, however, may arise, when the trade-mark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren or married daughters, for instance), though they may not bear the same name, yet, ordinarily, continue to use the original name as a trade-mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him.

Nor would the case be necessarily different, if, instead of passing into other hands, by the devolution of law, the manufactory were sold and assigned to a purchaser. The question, in every such case, must be whether the purchaser, in continuing the use of the original trade-mark, would, according to the ordinary uses of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark. In such a case, I see nothing to make it improper for the purchaser to use the old trade-mark, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory which he had purchased."

We cite, also—

Edelstine v. *Vick*, 11 Hare, 78–87.

Dixon Crucible Co. v. *Guggenheim*, 7 Philadelphia, 408–420.

We respectfully submit that the decree of the Circuit Court should be affirmed.

HOADLY, JOHNSON & COLSTON,

Counsel for W. W. Johnson & Co.

CINCINNATI, *March* 11, 1880.